Supreme Court, U. S.
FILED
MAR 3 1972

APPENDIX

Volume I — Pages 1 – 496

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-991

OTTER TAIL POWER COMPANY,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

FILED FEBRUARY 4, 1972
PROBABLE JURISDICTION NOTED MAY 22, 1972

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## APPENDIX—VOLUMES I AND II

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## TRANSCRIPT OF TESTIMONY AND PROCEEDINGS*

### OPENING STATEMENTS


Mr. Anderson ..... A.213 [T.I,2]
Mr. Field ..... A.220 [T.I,12]


### GOVERNMENT'S WITNESSES


Harland Martinson:
Direct examination ..... A.286 [T.I,109]
Cross-examination ..... A.299 [T.I,127]
Edward C. Spethmann:
Direct examination ..... A.312 [T.II,2]
Harland Martinson:
Cross-examination (cont'd) ..... A.321 [T.II,14]
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Hubert Lewis, Jr.:
Direct examination ..... A.331 [T.II,29]
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Ernest Woytassek:
Direct examination ..... A.344 [T.II,49]
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Elaine Waples:
Direct examination ..... A.359 [T.II,71]
Cross-examination ..... A.362 [T.II,75]


*The Transcript of the Proceedings is contained in 10 volumes, one volume for each day of trial, each of which starts over with page 1. As a result, the Transcript page numbers must be related to the volume number. The pagination of the transcript references will be in the following form—(T.II,2).

Frank J. Belinskey:
Direct examination ..... A.373 [T.II,92]
Cross-examination ..... A.375 [T.II,94]
Joseph O. Perino:
Direct examination ..... A.378 [T.II,100]
John S. Holten:
Direct examination ..... A.394 [T.III,2]
Cross-examination ..... A.404 [T.III,15]
James L. Grahl:
Direct examination ..... A.430 [T.IV,2]
Cross-examination ..... A.440 [T.IV,15]
Redirect examination ..... A.475 [T.IV,63]
William E. Trommershausen:
Direct examination ..... A.491 [T.V,2]
Cross-examination ..... A.550 [T.V,85]
Redirect examination ..... A.633 [T.VI,83]
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OPENING STATEMENT
Mr. Field ..... A.651 [T.VI,110]

DEFENDANT'S WITNESSES
Albert V. Hartl:
Direct examination ..... A.656 [T.VI,119]
Cross-examination ..... A.752 [T.VII,116]
Redirect examination ..... A.823 [T.VIII,95]
Recross-examination ..... A.844 [T.IX,10]
Redirect examination ..... A.849 [T.IX,16]

**Warren Nye:**
**Direct examination** ..... A.851 [T.IX,20]
**Cross-examination** ..... A.893 [T.IX,80]
**Redirect examination** ..... A.912 [T.IX,107]
**Recross-examination** ..... A.917 [T.IX,113]
**Walter A. Morton:**
**Direct examination** ..... A.919 [T.X,2]
**Cross-examination** ..... A.965 [T.X,66]

## GOVERNMENT'S EXHIBITS*

GX Exhibits 1 through 294 were all offered and received on page A.285 [T.I,108] and are described on the Government Exhibit list.

| GX | Offered | Received | Description |
|---|---|---|---|
| 206-A | A.534 [T.V,63] | A.534 [T.V,63] | Map indicating Hankinson and Elbow Lake. |
| 206-B | A.903 [T.IX,95] | A.904 [T.IX,95] | Map. |
| 295 | A.288 [T.I,111] | A.288 [T.I,112] | Elbow Lake Council Minutes, 9/8/62. |
| 296 | A.289 [T.I,113] | A.291 [T.I,116] | Various Elbow Lake Council Minutes from 6/6/60 to 5/7/65. |
| 297 | A.294 [T.I,120] | A.295 [T.I,121] | Letter, Martinson to Wolter, 7/8/65. |
| 298 | A.294 [T.I,120] | A.295 [T.I,121] | Letter, Wolter to Martinson, 8/10/65. |

* This list of Exhibits and their descriptions is compiled from the introductory pages of each volume of the Transcript prepared by the Court Reporter.

## GOVERNMENT'S EXHIBITS

| GX | Offered | Received | Description |
|---|---|---|---|
| 299 | A.298 [T.I,126] | A.298 [T.I,126] | Electric power case study for Village of Elbow Lake. |
| 300, 301 | A.315 [T.II,4] | A.315 [T.II,4] | Letters Re: Colman. |
| 302, 303 | A.315 [T.II,4] | A.315 [T.II,4] | Letters Re: Alexandria. |
| 304, 305, and 306 | A.319 [T.II,13] | A.319 [T.II,13] | Letters between Elbow Lake and Basin Electric. |
| 307 | A.332 [T.II,32] | A.332 [T.II,32] | Contract for electric service, Bureau of Reclamation and Colman. |
| 308 | A.332 [T.II,32] | A.332 [T.II,32] | Re: Litigation |
| 309 | A.332 [T.II,32] | A.332 [T.II, 32] | Report of Buell & Winter, Minutes of City Council of Colman. |
| 311 thru 317 | A.344 [T.II,49] | A.344 [T.II,49] | Exhibits Re: Woytassek's testimony. |
| 318 thru 329 | A.361 [T.II,75] | A.361 [T.II,75] | Exhibits Re: Waples' testimony. |

GOVERNMENT'S EXHIBITS

| GX | Offered | Received | Description |
|---|---|---|---|
| 330 | A.376 [T.II,97] | A.376 [T.II,97] | Letter from Bartel. |
| 331 | A.376 [T.II,97] | A.376 [T.II,97] | Waples, Minutes. |
| 332 thru 338 | A.376 [T.II,97] | A.376 [T.II,97] | Waples, Letters. |
| 339 | Withdrawn | | |
| 340 | A.376 [T.II,97] | A.376 [T.II,97] | Waples, Letter. |
| 341 | A.376 [T.II,97] | A.376 [T.II,97] | Waples, Agreement. |
| 342 | A.376 [T.II,97] | A.376 [T.II,97] | Waples, Letter. |
| 343 | A.376 [T.II,97] | A.376 [T.II,97] | Waples, Contract. |
| 344 thru 348 | A.379 [T.II,101] | A.379 [T.II,101] | Perino, Letters. |
| 349 | A.381 [T.II,104] | A.381 [T.II,104] | Hickerson, Letter. |
| 350 thru 356 | A.383 [T.II,107] | A.384 [T.II,110] | Re: George Danforth. |
| 357, 358 | A.400 [T.III,10] | A.404 [T.III,14] | Letters by Holten to Woytassek and Healey. |

GOVERNMENT'S EXHIBITS

| GX | Offered | Received | Description |
|---|---|---|---|
| 359 thru 371 | A.400 [T.III,10] | A.404 [T.III,14] | Letters by Holten Re: City of Colman. |
| 372 | A.400 [T.III,10] | A.404 [T.III,14] | "Signature Certificate". |
| 373 | A.400 [T.III,10] | A.404 [T.III,14] | "Faegre and Benson" "$95,000 Electric Revenue Bonds of 1964, City of Colman." |
| 374 thru 426 | A.414 [T.III,28] | — | — |
| 374 thru 434 | A.479 [T.IV,69] | | |
| 374 thru 378 | | A.487 [T.IV,82] | Exhibits 374 thru 434 described on Government's Exhibit list. |
| 419 thru 426 | | A.487 [T.IV,82] | |
| 428 | | A.487 [T.IV,82] | |
| 431 thru 434 | | A.487 [T.IV,82] | |

GOVERNMENT'S EXHIBITS

| GX | Offered | Received | Description |
|---|---|---|---|
| 435 | A.495 [T.V,7] | A.495 [T.V,7] | Systems Map Central Power Coop. |
| 436 | A.495 [T.V,7] | A.495 [T.V,7] | Systems Map UPA. |
| 437 | A.495 [T.V,7] | A.495 [T.V,7] | Systems Map CPA. |
| 438 | A.495 [T.V,7] | A.495 [T.V,7] | Systems Map East River Cooperative. |
| 439 | A.498 [T.V,11] | A.508 [T.V,27] | Transmissions Map Otter Tail Service Area. |
| 440 | A.512 [T.V,32] | A.512 [T.V,32] | Transmissions Map Otter Tail Service Area. |
| 441 | A.512 [T.V,32] | A.513 [T.V,33] | Otter Tail Report Filed 1970 with FPC. |
| 442 | A.512 [T.V,32] | A.513 [T.V,33] | Otter Tail Report Filed 1960 with FPC. |
| 443 | A.514 [T.V,35] | A.515 [T.V,36] | Bureau of Reclamation Map 1970, Missouri River Basin Power System. |
| 444 | A.769 [T.VIII,16] | A.769 [T.VIII,16] | Statement of A. V. Hartl. |

## GOVERNMENT'S EXHIBITS

| GX | Offered | Received | Description |
|---|---|---|---|
| 445 | A.817 [T.VIII,86] | A-817 [T.VIII,86] | Speech by A. V. Hartl 11-18-70. |
| 446 | A.975 [T.X,80] | A.975 [T.X,80] | Government Exhibit List, Exhibits 1 thru 294. |
| 447 | A.975 [T.X,80] | A.975 [T.X,80] | Government Exhibit List, Exhibits 374 thru 434. |

## DEFENDANT'S EXHIBITS

| DX | Offered | Received | Description |
|---|---|---|---|
| 1 | A.291 [T.I,116] | A.291 [T.I,116] | Elbow Lake Council Minutes, 8/7/61. |
| 2 | A.291 [T.I,116] | A.291 [T.I,116] | Elbow Lake Council Minutes, 8/17/61. |
| 3 | A.291 [T.I,117] | A.291 [T.I,117] | Elbow Lake Council Minutes, 6/4/62. |
| 4 | A.291 [T.I,117] | A.291 [T.I,117] | Elbow Lake Council Minutes, 8/6/62. |
| 5 | A.292 [T.I,117] | A.292 [T.I,117] | Elbow Lake Council Minutes, 6/7/65. |

DEFENDANT'S EXHIBITS

| DX | Offered | Received | Description |
|---|---|---|---|
| 6 | A.320 [T.II,14] | A.320 [T.II,14] | Letter by Nye to Village of Elbow Lake. |
| 7 & 8 | A.325 [T.II,21] | A.325 [T.II,21] | Letters to Martinson. |
| 9 | A.359 [T.II,71] | A.359 [T.II,71] | Letter by Woytassek. |
| 10 & 11 | A.356 [T.II,66] | A.356 [T.II,66] | Letters. |
| 12 | A.356 [T.II,66] | A.356 [T.II,66] | Minutes. |
| 13 | A.356 [T.II,66] | A.356 [T.II,66] | Letter, 2-14-64. |
| 14 | A.356 [T.II,66] | A.356 [T.II,66] | Articles of Incorporation. |
| 15 | A.356 [T.II,66] | A.356 [T.II,66] | Bylaws. |
| 16 | A.367 [T.II,83] | A.367 [T.II,83] | Contract. |
| 17 & 18 | A.367 [T.II,83] | A.367 [T.II,83] | Agreements. |
| 19 | A.368 [T.II,84] | A.368 [T.II,84] | Letter. |
| 20 | — | — | Same as GX242 |
| 21 | — | — | Same as GX247 |
| 22 | A.416 [T.III,32] | A.417 [T.III,32] | |
| 22 | Withdrawn on A.429 [T.III,50] | | Same as GX237 |

## DEFENDANT'S EXHIBITS

| DX | Offered | Received | Description |
|---|---|---|---|
| 23 | A.460 [T.IV,43] | A.460 [T.IV,43] | July, 1970, Booklet published by Missouri Basin Systems Group. |
| 24 | A.460 [T.IV,43] | A.460 [T.IV,43] | North Central Power Study. |
| 25 thru 37 | A.489 [T.IV,85] | A.489 [T.IV,86] | Campaign material. |
| 38 | Marked for Identification A.503 [T.V,19] | | |
| 38 | A.610 [T.VI,51] | A.611 [T.VI,52] | Source Map. |
| 39 | A.610 [T.VI,52] | A.611 [T.VI,52] | Source Map. |
| 40 | A.726 [T.VII,81] | A.727 [T.VII,81] | Otter Tail Chart. |
| 41 | A.738 [T.VII,97] | A.739 [T.VII,97] | Otter Tail Chart. |
| 88 | A.825 [T.VIII,98] (See A.826 [T.VIII,99].) | A.825 [T.VIII,98] | Engineering Study. |
| 42 thru 87 | A.850 [T.IX,18] | A.850 [T.IX,18] | Documentation of cases in area of litigation. |
| 89 | A.840 [T.IX,4] | A.840 [T.IX,4] | List of REA cooperatives. |

## DEFENDANT'S EXHIBITS

| DX | Offered | Received | Description |
|---|---|---|---|
| 90 | A.851 [T.IX,19] | A.851 [T.IX,19] | 1969 REA Statistical Report. |
| 91 | A.857 [T.IX,28] | A.858 [T.IX,30] | Excerpts from Exhibit GX-2. |
| 92 | A.861 [T.IX,35] | A.864 [T.IX,39] | Map. |
| 93 | A.861 [T.IX,35] | A.864 [T.IX,39] | Map. |
| 94 | A.873 [T.IX,52] | A.873 [T.IX,52] | Study of Power Supply, Area 26. |
| 95 | A.933 [T.X,21] | A.938 [T.X,28] | Study and schedules of Dr. Morton. |
| 96 | A.952 [T.X,47] | A.952 [T.X,48] | Study and schedules of Dr. Morton. |
| 97 | A.958 [T.X,56] | A.958 [T.X,56] | Study and schedules of Dr. Morton. |
| 98 | A.975 [T.X,81] | A.976 [T.X,82] | List of towns served by Co-operatives at retail. |

DX99—Letter from East River to Elbow Lake. Added to record by Order dated Nov. 8, 1971 ..... A.1211

Otter Tail Dep. Ex. A—Army Engineers' study. Offered and received in evidence at A.315 [T.II,6,7] ..... A.1214

Chart Submitted by the United States—Included in Record by Order dated July 5, 1972 ..... A.1219

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-991

OTTER TAIL POWER COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

## THE RELEVANT DOCKET ENTRIES IN THE PROCEEDING BELOW

7-14-69 — Filed Complaint.
Issued Summons.
Case assigned to J. Devitt.
7-22-69 — Filed Summons, returned served 7-15-69.
8-4 — Filed Answer with aff. of serv. by mail 8-1-69.
8-19-69 — Filed Motion To Associate Counsel Kenneth C. Anderson and Keith I. Clearwaters of U. S. Dept. of Justice, Washington D.C., and entered Order therein that Kenneth C. Anderson and Keith I. Clearwaters be and are, recog-

nized as co-counsel for U.S. in entitled and numbered proceeding. (Devitt-J 8-14-69)

9-29-69 — Filed Plaintiff's Interrogatories To Defendant with Cert. of Service by mail 9-26-69.

10-31-69 — Filed Answers of Deft to Plaintiff's Interrogatories. Cert. of Serv. by Mail 10-30-69 attached.

12-8-69 — Filed Plaintiff's Notice of Motion For The Production of Documents and Motion For Production of Documents. Affidavit of Kenneth C. Anderson attached. Certificate of Service by mail 12-3-69 attached. Noticed for hearing at St. Paul on 12-22-69 at 9:00 A.M. or as soon thereafter as counsel can be heard, for an order granting Motion for Production of Documents.

Filed Memorandum of Points and Authorities In Support of Plaintiff's Motion For The Production of Documents Pursuant to Rule 34 of the Federal Rules of Civil Procedure. Cert. of Serv. by Mail 12-3-69 attached.

12-16-69 — Filed Defendant's Response To Motion For The Production of Documents. Aff. of serv. by Mail 12-15-69 attached.

Filed Defendant's Brief In Support of Defendant's Response To Motion For Production of Documents.

5-26-70 — Entered record of pretrial conference, during which the case is set for trial in November of 1970 at St. Paul. (Devitt, J.)

6-30-70 — Filed Deft's Motion for Continuance together with Notice of hearing on the Foregoing Motion at St. Paul Aug. 10, 1970 at 9:00 A.M. or as soon thereafter as counsel can be heard, or at such other time and place as may be determined by the Court. Cert. of Service by mail 6-4-70 attached.

8-24 — Entered record of hearing on deft's motion for cont.: argued, denied. Order to be submitted. (Devitt, J.; Lindberg, reporter)

8-31 — Filed and entered Order denying continuance. (Devitt, J.) Mailed notice to counsel.

9-14 — Filed reporter's notes of proceedings had 8-24-70. (Lindberg, reporter)

Filed reporter's transcript of proceedings of 8-24-70.

9-16 — Filed defendant's interrogatories 1 and 2, with aff. of serv. by mail 9-11-70.

9-21-70 — Filed plaintiff's notice to take depositions of Warren K. Nye, Albert C. Hartl, P. J. Brewer, R. W. Nygard, J. J. Seashore, with certificate of service by mail on 9-18-70.

9-29-70 — Filed Plaintiff's Notice of Motion For the Production of Documents and Motion For Production of Documents. Noticed for hearing Oct. 12, 1970 at 9:00 A.M. or as soon thereafter as counsel can be heard for an order. Aff. of serv. by mail 9-25-70, attached.

9-29-70 — Filed pretrial order no. 1, setting pretrial conference 12-21-70 at 9:00 a.m. (Devitt, J.) Order bears approval of counsel for the respective parties.

10-1-70 — Filed plaintiff's answers to interrogatories, with aff. of serv. by mail 9-30-70.

10-6 — Filed and entered order granting plaintiff's ex part Motion to associate counsel. (Devitt, J.) The order is on the same page as the Motion itself.

10-7 — Filed defendant's response to plaintiff's second motion for production of documents. Cert. of personal service 10-5-70 attached.

10-12-70 — Filed Partial Stipulation of Facts.

11-19-70 — Filed Plaintiff's Supplemental Answers to Interrogatories Proposed by Deft. Cert. of Serv. by Mail 11-17-70 attached.

12-14-70 — Filed Defendant's Statement re Defendant's Witnesses. Cert. of serv. by mail 12-11-70.

12-21 — Filed Additional Stipulation of Facts, with exhibits "A" through "KK" inclusive.

Entered Record of pretrial conference. Further pretrial 2-16-71 with briefs to be submitted prior to that date. Trial set tentatively 5-24-71. (Devitt, J.; Anderson, reporter)

1-15-71 — Filed and entered Pretrial order No. 2, setting a second pretrial conference at St. Paul 2-16-71, and tentative trial date of 5-24-71 in St. Paul. (Devitt, J.; 1-12-71) Document bears approval of counsel for both parties. Mailed conformed copy of the order to counsel for the respective parties.

2-1-71 — Filed Defendant's Response To Plaintiff's Proposed Stipulation of Facts Supplement No. 1, and Proposed Additional Stipulation of Facts as To Documentary Evidence. Aff. of Serv. by mail 1-29-71 attached.

2-8-71 — Filed Copy of Pre-trial Brief by U. S. Department of Justice.

2-16-71 — Entered Minutes of Proceedings of record of pretrial conference (Devitt, J.) (Lindberg, Reporter)

3-9-71 — Filed Reporter's Notes of hearing 2-16-71 (No. 139) Lindberg, Reporter.

3-15-71 — Filed and entered Pretrial Order No. 3 (Devitt, J. 3-15-71)

Mailed Notice to Counsel

5-3-71 — Filed deft. Otter Tail's compliance with paragraph

3(a) of pretrial order No. 3, with eight exhibits, five of them received this date, the rest en route. Aff. of serv. 4-30-71 attached.

Filed Deft. Otter Tail's compliance with paragraph 3(b) of pretrial order no. 3, with aff. of serv. 4-30-71.

3 large plats received and are now in exhibit room.

5-4 — Filed additional stipulation of facts, supplement no. 1, with exhibits listed on letter attached to the stip.

5-10-71 — Filed Otter Tail's Compliance with Paragraph 2 of Pretrial Order No. 3. Aff. of Serv. by Mail 5-7-71 attached.

5-17-71 — Filed defendant's compliance with paragraphs 4 (a) and (b) of pretrial order no. 3. Aff. of Serv. on 5-14-71 attached.

6-4-71 — Entered further record of trial (Devitt, J.) (Anderson-Sutfin, Reporter)

8-2-71 — Lodged Plaintiff's Post-Trial Reply Brief and delivered same to Judge Devitt.

5-17-71 — Filed plaintiff's compliance with paragraph 4 of pretrial order no. 3.

Lodged plaintiff's reply to defendant's pretrial brief.

Lodged plaintiff's pretrial findings of fact and conclusions of law.

Delivered above reply and pretrial findings to Judge Devitt.

Filed cert. of service of foregoing three items by mail on 5-16-71.

6-1-71 — Entered record of trial (Devitt, J.) (Anderson-Sutfin, Reporters)

6-2-71 — Filed Deposition of Albert C. Hartl taken October 5, 1970.

Filed Deposition of P. J. Brewer taken October 9, 1970.

Filed Deposition of Warren K. Nye, taken October 8, 1970.

Filed Deposition of Robert W. Nygard, taken October 9, 1970.

Filed Deposition of James J. Seashore, taken October 9, 1970.

6-3-71 — Filed Reporter's Deposition of Frederick William Muller, taken 5-24-71, Vol. I.

Filed Deposition of Frederick William Muller, taken 5-25-71, Vol. II

Filed Deposition of Frederick William Muller, taken 5-25-71, Vol. III

Filed Deposition of Frederick William Muller, taken 5-25-71, Vol. IV

Filed Deposition of Frederick William Muller, taken 5-26-71, Vol. V.

6-2-71 — Entered record of further trial (Devitt, J.) (Anderson-Sutfin, Reporters)

6-3-71 — Entered record of further trial (Devitt, J.) (Anderson-Sutfin, Reporters)

6-4-71 — Entered record of further trial (Devitt, J.) (Anderson-Sutfin, Reporters)

6-7-71 — Entered record of further trial (Devitt, J.) (Anderson-Sutfin, Reporters)

6-8-71 — Entered record of further trial (Devitt, J.) (Anderson-Sutfin, Reporters)

6-9-71 — Entered record of further trial (Devitt, J.) (Anderson-Sutfin, Reporters)

6-10-71 — Entered record of further trial (Devitt, J.) (Anderson-Sutfin, Reporters)

6-11-71 — Entered record of further trial (Devitt, J.) (Anderson-Sutfin, Reporters)

6-14-71 — Entered record of further trial; matter taken under advisement. Counsel are to submit briefs and proposed findings simultaneously July 14, 1971 and reply briefs by July 30, 1971.

Filed list of exhibits.

Filed reporter's transcript of testimony of trial from June 1 thru June 11, 1971, in 9 volumes. (Anderson-Sutfin)

9-9-71 — Filed and entered Memorandum and Order finding that deft. has attempted to, and has, monopolized interstate commerce in the retail distribution of electric power in violation of Section 2 of the Sherman Act; order enjoins deft. from continuing the violations herein found to exist. Counsel for plaintiff is directed to submit findings of fact, conclusions of law and order for judgment, together with a proposed form of judgment. (Devitt, J.)

9-9-71 — Mailed conformed copy of the foregoing Memo and Order to counsel for the respective parties, as listed on these docket sheets.

Filed reporter's transcript of proceedings 6-14-71. (Anderson-Sutfin, Reporters)

Filed reporter's transcript of trial of 6-14-71 (Anderson-Sutfin, Reporters)

9-9-71 — Filed one document entitled: Transcript directing suggestions by deft. in re: Vol. 1-10.

9-27-71 — Filed Praecipe of John W. Wright, Operations Attorney, Rural Electrification Division, U.S. Dept. of Agriculture, Office of the General Counsel, Washington, D.C. 20250. Copy issued and mailed 9-13-71 pursuant to telephone order.

Filed Praecipe of Mrs. Ruth H. Jacobson, Secretary of Judicial Panel on Multidistrict Litigation for copy of opinion dated 9-9-71. Issued and mailed.

10-22-71 — Filed and entered Findings of Fact, Conclusions of Law in favor of the plaintiff. (Devitt, J.)

Filed and entered Judgment enjoining and restraining deft. from violating the Sherman Act. Copy attached. (Devitt, J.)

Mailed notice to counsel.

10-28-71 — Filed defendant's alternative motions for a new trial or for amended and/or additional findings of fact and for amended and/or additional conclusions of law, and to amend the judgment accordingly, with notice of hearing, returnable at St. Paul at 11:00 a.m. Nov. 8, 1971, and certificate of service by mail on 10-27-71.

Filed and entered order staying enforcement of judgment pending disposition of motions filed this date, directing that deft. furnish bond. (Devitt, J.)

Filed defendant's bond in the sum of $50,000.00.

Mailed notice to counsel of the foregoing order and of filing of the bond.

11-8-71 — Entered record of hearing of Deft's Motion for New Trial and/or for amended Findings of Fact, Conclusions of Law and to amend Judgment accordingly: Argued, submitted to and by the Court denied as to a new trial. Mr. Field to submit an Amended Judgment for the Court's signature and the Court stays the entry of Judgment. (Devitt, J.) (Anderson, Reporter)

Filed and entered Order re Transcript corrections and DX 99.

11-10-71 — Filed and entered order amending judgment herein. (Devitt, J.; 11-10-71)

Filed and entered amended judgment. (Devitt, J.)

Mailed conformed copies of the foregoing order and amended judgment to Mr. Field and to Kenneth C. Anderson.

Mailed notice to counsel.

12-7-71 — Filed defendant's notice of appeal to U. S. Supreme Court.

Filed and entered order suspending injunction during appeal. (Devitt, J.)

Mailed copy of conformed notice of appeal to United States Attorney, 596 U.S. Courthouse, 110 South 4th St., Mpls., Minn. 55401, to Kenneth C. Anderson, Keith C. Anderson, and Herbert D. Miller, Jr., each individually, addressed as follows: U. S. Department of Justice, Washington, D. C.

Filed request by defendant for certification and transmission of record to the Supreme Court of the U. S.

Mailed notice to counsel of the foregoing order filed this date.

12-9 — Filed and entered order for transmission of original record and original exhibits to U. S. Supreme Court. (Devitt, J.) Conformed copy of this order mailed to counsel for the respective parties.

1-13-72 —Mailed certificate with original files and copies of docket sheets and notice of appeal, certified, to Clerk, Supreme Court of the United States, Supreme Court Building, Washington, D. C. 20544, with copy of cover letter to counsel whose names and addresses are on the first page of the docket sheet.

14 — Mailed exhibits to Clerk, Supreme Court of the U. S. addressed as above.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
SIXTH DIVISION

(Title Omitted in Printing)

## COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendant named herein and complains and alleges as follows:

### I.
### JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the defendant under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. §4), commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Section 2 of the Sherman Act (15 U.S.C. §2).

2. The alleged violation of law hereinafter described has been and is being carried out in part within the Sixth Division of the District of Minnesota where the defendant has offices, transacts business and is found.

### II.
### THE DEFENDANT

3. Otter Tail Power Company (hereinafter "Otter Tail") is made a defendant herein. Otter Tail is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business in Fergus Falls, Minnesota. It generates, transmits and sells electric power at retail and wholesale.

## III.
## TRADE AND COMMERCE

4. The electric power industry is comprised generally of three functional levels: production, transmission and distribution. Production encompasses the conversion into electric power of energy obtained from combustion of fossil fuels, from moving water, or more recently, from atomic reaction. Transmission refers to the transportation of electric energy via a network of high voltage lines from points of generation to distribution areas. Distribution involves the delivery and sale of electric current to ultimate consumers. Although most large electric utilities, including Otter Tail, perform all three functions, some companies perform only one or two of such functions. For example, the Bureau of Reclamation of the Department of the Interior (hereinafter "the Bureau") and many electric cooperatives restrict their activities to the production and transmission of electric power. Also, many municipal power systems and electric cooperatives engage solely in distribution of electric energy to ultimate consumers.

5. Otter Tail operates an integrated electric power system in western Minnesota, northeastern South Dakota and eastern North Dakota. It maintains generation facilities having a capacity of approximately 280,000 kilowatts. In addition, the company purchases substantial amounts of electric power produced by the Bureau.

6. Otter Tail has 5,900 miles of transmission lines which blanket its tri-state area of operations. These lines cross state boundaries and carry power produced both by Otter Tail and the Bureau. Although various electric cooperatives have transmission lines within the tri-state Otter Tail area, Otter

Tail's network of high voltage lines is the dominant factor in the transmission of power in the area. Bureau-generated electric power is transmitted ("wheeled") by Otter Tail to certain Bureau customers pursuant to an agreement between the Bureau and Otter Tail. In addition, Otter Tail has agreements with various electric cooperatives under which each party agrees to wheel electric power over its lines for the other. In 1966, Otter Tail wheeled a total volume of 523,704,610 kilowatt hours of electric power, from which it derived revenues of $508,613.

7. The statutes of the States of Minnesota, South Dakota and North Dakota give to each municipality the option of awarding a distribution franchise for a term of years to an electric utility company or of establishing and operating a municipally-owned electric power distribution system. Selection of the method by which electric power distribution is to be performed is made by the electorates of the respective towns. Changes in the method of distribution are authorized by the respective state statutes.

8. Otter Tail distributes electric power at retail in approximately 464 towns, which constitute the vast majority of towns in its service area. (Electric power distribution in rural areas within Otter Tail's service area is performed principally by electric cooperatives; however, the latter are restricted by law from distributing electric power within towns.) In 1967 Otter Tail sold 867,621,740 kilowatts of electric energy in the 464 towns, from which it derived revenues of $25,179,979.

9. In 1966 the municipal electric power systems of 18 towns located within the Otter Tail service area purchased all or part of their electric power requirements at wholesale from the Bureau. 122,864,314 kilowatt hours of electric energy

were wheeled over Otter Tail transmission lines part of the distance between Bureau generation facilities and the municipal systems.

10. Otter Tail is a member of the Upper Mississippi Valley Power Pool and sells to and buys from its fellow members electric power for resale. The members of the pool are located in several different states, and the power exchanged among them crosses state lines. In 1967 Otter Tail sold 166,107,600 kilowatt hours to pool members, from which it derived revenues of $1,607,616.

## IV.

## OFFENSES CHARGED

11. Beginning in or about 1955 and continuing thereafter up to and including the date of filing of this complaint, defendant Otter Tail has attempted to monopolize and has monopolized the aforesaid trade and commerce in the sale of electric power in or to towns located in the areas of Minnesota, North Dakota and South Dakota which it serves, in violation of Section 2 of the Sherman Act (15 U.S.C. §2). These offenses are continuing and will continue unless the relief hereinafter prayed for is granted.

12. Pursuant to and in furtherance of the aforesaid attempt to monopolize and monopolization, defendant Otter Tail has sought to prevent municipalities from shifting local electric service from Otter Tail to another electric power system, supplied either by Otter Tail or another supplier of power, by doing among other acts, the following:

1. refusing and threatening to refuse to sell power at wholesale to the proposed alternative local electric power systems;

2. refusing and threatening to refuse to wheel electric power from other wholesale power suppliers to the proposed alternative local electric power system; and

3. engaging in other activities designed to obstruct and defeat the attempt by municipalities to establish alternative local electric power system.

V.

EFFECTS

13. The aforesaid offenses have had, among other things, the following effects:

(a) Otter Tail has been able to preserve a monopoly of retail distribution in towns in its service area;

(b) Competition for local electric power distribution franchises has been eliminated;

(c) Yardstick competition in the retail distribution of electric power has been lessened;

(d) Competition in the wholesale sale of electric power has been restrained.

PRAYER

WHEREFORE, the plaintiff prays:

1. That the Court adjudge and decree that defendant Otter Tail has attempted to monopolize and has monopolized interstate trade and commerce in the retail distribution of electric power in violation of Section 2 of the Sherman Act.

2. That defendant Otter Tail and all persons, firms, and corporations acting in its behalf or under its direction or control be permanently enjoined from engaging in, carrying out, or renewing any contracts, agreements, policies, practices, or understandings, or claiming any rights thereunder having the purpose or effect of continuing, reviving, or renewing the aforesaid violation of the Sherman Act or any contract, agree-

ment, policy, practice, or understanding having like or similar purpose or effect.

3. That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

4. That the plaintiff may recover the costs of this action.

Dated:

KENNETH C. ANDERSON
Attorney, Department of Justice

JOHN N. MITCHELL
Attorney General
RICHARD W. McLAREN
Assistant Attorney General
BADDIA J. RASHID
JOSEPH J. SAUNDERS
Attorneys, Department of Justice

.....
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
SIXTH DIVISION

(Title Omitted in Printing)

ANSWER

Defendant Otter Tail Power Company (Otter Tail) for its Answer to the Complaint herein, respectfully alleges:

I.

GENERAL

Otter Tail admits that it is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business in Fergus Falls, Minnesota. Otter Tail further admits and alleges that it owns and operates an integrated electric system, which includes transmission lines which interconnect generating stations located at strategic points on the system and which system furnishes adequate and reliable retail electric service at reasonable rates to approximately 464 communities, and also to a substantial number of rural customers, located generally in western Minnesota, eastern North Dakota, and northeastern South Dakota. Otter Tail's system is connected with other major electric suppliers in the area pursuant to the provisions of special agreements which have been voluntarily negotiated and entered into. Otter Tail denies that its high voltage lines are the dominant factor in the transmission of power in the area. The statistics alleged in the Complaint are approximately correct, but, in connection with any statistics for wheeling, or pool transactions, or any transactions with other suppliers, the particular

special agreements under which they are performed must be referred to in order to understand their meaning, context, and limitations.

Paragraph 7 of the Complaint contains allegations regarding the laws of the three States of Minnesota, North Dakota, and South Dakota, the details of which the Court can take judicial notice of.

## II.

## OTTER TAIL'S GENERAL STATUS AND POLICY

Otter Tail is an investor-owned electric company which has, through its initiative and efficient management, put together its integrated electric system over the past 60 years, and which has been a leader in adopting modern technological advances, and in voluntarily negotiating and entering into interconnection agreements with other suppliers, and, as a consequence, has succeeded in bringing the advantages of scale to its retail electric consumers in a widespread and predominantly rural area. Of the 464 communities which it serves at retail only 28 have a population of 1,500 or greater, and only 2 have a population in excess of 10,000. This action, and its companion cases, the Village of Elbow Lake's Complaint before the Federal Power Commission,[1] and Elbow Lake's suit for treble damages and an injunction under the Sherman Act

[1] *Village of Elbow Lake, Minnesota vs. Otter Tail Power Company*, FPC Docket No. E-7278, which proceeding was commenced on March 16, 1966, and is presently being processed at the administrative level before the Federal Power Commission. There is also an appeal to the Circuit Court of Appeals of the Eighth Circuit from an interim order of the Federal Power Commission, which appeal is now pending. This appeal bears No. 19,628 in the Court of Appeals for the Eighth Circuit and is entitled "Otter Tail Power Company vs. Federal Power Commission and Village of Elbow Lake, Minnesota".

in this Court,[2] seek to compel Otter Tail to use its own facilities to support or subsidize a new municipal system that puts Otter Tail out of the retail business in that community. It is Otter Tail's position in this action, as well as in the companion cases mentioned, that to do so would create a precedent and situation which would subject its integrated system to erosion and would impair its credit in the money markets of the country. Otter Tail resists being compelled to use its own properties to destroy itself. Otter Tail denies that this position and policy of Otter Tail in any way violates the Sherman Act. On the contrary, Otter Tail alleges that it is not in the public interest, either from the standpoint of public utility regulation, or the antitrust laws, or the effect on both the customers and shareholders of Otter Tail, to create a situation or precedent tending toward that result.

III.

WHOLESALE SERVICE

Otter Tail has never held itself out generally to furnish electric service at wholesale, and its properties have not been dedicated to wholesale service. The consistent and historic policy of Otter Tail is to furnish service at retail to the ultimate consumer. This basic policy of Otter Tail was stated as early as 1947, as a part of Otter Tail's Electric Schedule filings with the Federal Power Commission. A copy of this Statement of Company's Policies and Practices as so filed with the Federal Power Commission in 1947 is attached hereto as Exhibit

[2] *The Village of Elbow Lake, Minnesota vs. Otter Tail Power Company*, being Civil Action File No. 6-67-244 in the United States District Court for the District of Minnesota, Sixth Division. The trial of this case in this Court has been continued until the completion of the administrative proceedings before the Federal Power Commission and of judicial review of its orders, by the Order of Honorable Edward J. Devitt, Chief Judge of this Court, dated June 20, 1969.

A. The few wholesale accounts Otter Tail once had were covered by special contracts and within the limitations of those contracts. With the availability of underpriced government power, the wholesale accounts covered by those special contracts have left Otter Tail to become preference customers of the Bureau of Reclamation. At the present time there is only one wholesale contract left, and that has been taken over by the Cass County Electric Cooperative, and expires by its terms in 1970. When this one remaining contract expires in 1970, the policy of the Company which has been followed down through the years will result in a complete divorcement of wholesale customers.

## IV.

## WHEELING SERVICE

One of the agreements which Otter Tail has voluntarily negotiated and entered into providing for interconnection with other suppliers is a contract between the Bureau of Reclamation of the Department of Interior (Bureau) and Otter Tail, dated June 14, 1955 (Bureau-Otter Tail Contract). The Bureau-Otter Tail Contract provides for the exchange of use of the facilities of the two parties as therein described, which includes the use of Otter Tail's transmission system by the Bureau to "wheel" Bureau power to its preference customers in the marketing area of the Bureau. A provision in the Bureau-Otter Tail Contract specifically provides that Otter Tail's transmission system is not to be used to wheel electric power to a municipality already receiving retail service from Otter Tail as of the date of that Contract in 1955. The Bureau-Otter Tail Contract also provides that Otter Tail does not dedicate or intend to dedicate its facilities to the common

carrying of electric energy for the account and use of the United States or anyone else. Excerpts from the Bureau-Otter Tail Contract containing these provisions are attached hereto as Exhibit B. The Bureau itself has thousands of miles of transmission lines throughout the area. What "wheeling" Otter Tail has done of Bureau power over Otter Tail's lines, as well as any other transactions between the Bureau and Otter Tail, have been done pursuant to the provisions of the Bureau-Otter Tail Contract.

V.

UPPER MISSISSIPPI VALLEY POWER POOL

Otter Tail admits and alleges that it is a charter member of the Upper Mississippi Valley Power Pool under the terms and provisions of an agreement which was voluntarily negotiated and entered into. Any transactions between Pool members are pursuant to the provisions of this agreement.

VI.

DENIAL OF OFFENSES CHARGED

Otter Tail specifically denies that it has done anything in violation of Section 2 of the Sherman Act (15 U.S.C. Sec. 2). Otter Tail admits and alleges that it has refused to permit the use of Otter Tail's facilities (by furnishing either wholesale or wheeling service) to subsidize or support a new municipal electric system which is constructed for the purpose of ousting Otter Tail from the retail electric business in that municipality. Otter Tail also admits and alleges that it attemps to use all reasonable means to continue in business, and to continue to furnish adequate and reliable service at reasonable rates at retail in the municipalities which are served by its integrated system, and in attempting to present its case that it

is to their advantage not to severe their connection with Otter Tail's system and service.

VII.

DENIAL OF ALLEGED EFFECTS

Otter Tail denies the existence of the alleged effects set forth in Paragraph V of the Complaint. On the contrary, Otter Tail alleges that it is subject to competition at all levels of its operations, and particularly in the area of retail distribution. Hence, Otter Tail's efforts to attempt to stay in business, and its policy not to furnish its own facilities to assist in putting itself out of business.

VIII.

CONSTITUTIONAL RIGHTS

Otter Tail alleges that to order Otter Tail to use its own facilities to support or subsidize a new municipal system which puts Otter Tail out of the retail business in that municipality, and establishes a precedent which will erode Otter Tail's integrated system and impair its credit, constitutes the taking of Otter Tail's property without due process of law or just compensation in violation of its constitutional rights (Article V of the Amendments to the United States Constitution).

IX.

GENERAL DENIAL

Further answering the Complaint, defendant denies each and every allegation therein contained, except as is hereinbefore admitted, alleged or otherwise stated.

PRAYER

WHEREFORE, the defendant prays the Judgment of this Court determining that Otter Tail has not violated Section 2 of the Sherman Act, and that this action be dismissed on its

merits, and that the defendant recover its costs and disbursements of this action.

Dated August 1, 1969.

CYRUS A. FIELD
Of the firm of
FIELD, ARVESEN, DONOHO,
LUNDEEN & HOFF
Fergus Falls National
Bank Building
Fergus Falls, Minnesota 56537
Attorneys for the Defendant

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## EXHIBIT A

Otter Tail Power Company
FPC Electric Schedules
Original Sheet No. 2

### PRELIMINARY STATEMENT AND GENERAL EXPLANATION OF COMPANY'S POLICIES AND PRACTICES

Otter Tail Power Company is an integrated operating electric utility engaged in the business of generation, transmission, distribution and sale of electric energy within portions of the States of Minnesota, North Dakota and South Dakota. The major source of generation is steam generating plants. The Company's general policy and practice is to serve customers at retail within the area served by it. The furnishing of electric service at wholesale is incidental and limited to those wholesale purchasers with whom the Company has contracted for such service. The Company has never held itself out generally to serve wholesale purchasers.

Issued By: C. G. Wright, Vice President
Effective: November 1, 1947

EXHIBIT B

Contract No. I79r-1592
Supplement No. 2

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Missouri River Basin Project—Eastern Division
Minnesota, North Dakota, and South Dakota
CONTRACT FOR ELECTRIC SERVICE TO
OTTER TAIL POWER COMPANY

1. This Supplemental Contract made this 14th day of June 1955, in pursuance of the Act of Congress approved June 17, 1902, (32 Stat. 388), the Act of Congress approved December 22, 1944 (58 Stat. 887), and acts amendatory thereof or supplementary thereto, between the UNITED STATES OF AMERICA, hereinafter called the United States, represented by the officer executing this contract, his duly appointed successor, or his duly authorized representative, hereinafter called the contracting officer, and OTTER TAIL POWER COMPANY, a corporation duly organized, created, and existing under and by virtue of the laws of the State of Minnesota, hereinafter called the Contractor, its successors and assigns;

WITNESSETH

2. WHEREAS, the parties hereto have entered into that certain Contract No. I79r-1592, dated March 14, 1950, and Supplement Number 1 thereto, dated February 28, 1952, together hereinafter called the original contract, and it is the desire of the parties hereto to codify, and in certain respects to modify, the arrangements provided in said contract and its supplement, to the extent that these arrangements have not already terminated; and * * *

specified by the Contractor not less than four (4) years from the date such notice is received by the contracting officer; *Provided*, That the United States, at any time after receipt of said notice from the Contractor terminating the application of PART FOUR hereof, in whole or in part, may terminate this PART FOUR on not less than thirty (30) days' written notice to the Contractor.

(e) If any public regulatory body or commission has or asserts jurisdiction over this PART FOUR or any part thereof, the Contractor shall promptly apply to such body or commission for an order authorizing the Contractor to carry out the terms thereof, and will, in such event, prosecute the application and any proceedings thereon with due diligence. If such application be denied, then the United States may terminate this PART FOUR on not less than thirty (30) days' written notice to the Contractor. Unless and until so terminated, this PART FOUR shall be inoperative only to the extent the order denying the application provides.

(f) It is understood and agreed that the Contractor, by entering into this contract, does not dedicate or intend to dedicate its facilities to the common carrying of electric energy for the account and use of the United States or anyone else.

DELIVERIES OF ELECTRIC POWER AND ENERGY

27. (a) The United States, under the terms and conditions stipulated in this PART FOUR, will furnish the electric power and energy required for the United States and/or its customers at the points of interconnection and nominal voltages specified in Article 10 hereof, and at the point or points of interconnection between the systems of the Contractor and Northern States Power Company, and at the nominal voltages of such interconnections, pursuant to the provisions of the contract between the United States and Northern States Power Company hereinbefore referred to; *Provided*, That delivery

to Northern States Power Company for redelivery to the Contractor shall be deemed delivery to the Contractor hereunder.

(b) The electric power and energy will be furnished and delivered hereunder as three-phase, alternating current, at a nominal frequency of 60 cycles per second in such amounts and at such rates of delivery as are from time to time required by the United States for redelivery to itself, Northern States Power Company, and/or its customers, plus losses in transmission equal to seven percent (7%) of maximum coincidental demand and seven percent (7%) of the energy deliveries to loads of the United States and/or its customers served by the United States directly from the system of the Contractor; *Provided,* That except for the deliveries (i) to the Village of Badger, South Dakota, and (ii) to the one existing delivery to Central Power Electric Cooperative at less than 34,500 volts, whenever pursuant to paragraph (l) of the proviso in Article 31(a) delivery is made from the system of the Contractor at less than 34,500 volts, the losses in transmission for which the United States shall supply power and energy pursuant to this Article shall be 10% in lieu of the 7% allowed for above; and *Provided further,* That except as otherwise specified in Article 26(c) the electrical load thus added plus the then existing load on the Contractor's facilities will not exceed the normal capacity thereof, as determined by the Contractor. Deliveries that are inadvertently greater or less than requirements to serve the loads and customers of the United States shall be corrected in later deliveries pursuant to Article 11.

(c) The electric power and energy to be delivered by the Contractor to the United States and/or its customers pursuant to this PART FOUR shall be limited to such electric power and energy as is necessary for preference customers (as defined in the Reclamation Law) and Federal establishments:

(1). Which have had monthly maximum demands of 100 kilowatts or more each for three consecutive months in the twelve months immediately preceding the date on which the Contractor is requested to commence service; *Provided*, That reductions in the monthly maximum system demand of any customer after delivery to such customer commences hereunder shall not affect the obligation of the Contractor to continue delivery, and

(2) Which are located and use such power and energy outside the corporate boundaries of municipalities wherein the Contractor now serves at retail.

In view of the difficulty of anticipating future facts and conditions, it is understood that if additional loads of the United States or customers of the United States become prospective, the parties hereto will then consider the problem of serving such loads, and the Contractor will advise the United States within ninety (90) days after request whether or not service to such additional loads or customers shall be made available hereunder.

PAYMENT FOR TRANSMISSION SERVICE

28. (a) The United States will compensate the Contractor for the transmission and delivery of electric power and energy to the United States as provided in this PART FOUR, subject to additional compensation as provided in Article 29, in the amount of one mill ($0.001) per * * *

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

(Title Omitted in Printing)

MEMORANDUM & ORDER

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Kenneth C. Anderson, William Jaeger and Barry McNeil, Washington, D. C., attorneys for plaintiff.
Cyrus Field and David Lundeen, Fergus Falls, Minnesota, attorneys for defendant.

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In this action brought under Section 2 of the Sherman Act the basic issue is whether the acts of Otter Tail Power Company, a Minnesota public utility, in refusing to sell electric power at wholesale, and refusing to wheel electric power to municipalities it formerly served at retail, constitute a monopolization of commerce in violation of the Act.

The Sherman Act, Section 2, provides:

> "Every person who shall monopolize, or attempt to monopolize * * * any part of the trade or commerce among the several states * * * shall be guilty of a misdemeanor * * *, 15 U.S.C. §2.

Under Section 4 of the Act the United States District Court is vested with jurisdiction to restrain violations of the law. 15 U.S.C. §4. Plaintiff seeks such an injunction.

Defendant Otter Tail Power Company with headquarters at Fergus Falls, Minnesota, is an investor-owned utility pri-

marily serving small towns in western Minnesota and eastern North and South Dakota. Its business is almost exclusively retail. Its operation consists of an integrated power system running the full gamut from initial production to final sale of electrical power combined with pool arrangements which supply emergency power reserves.

From time to time citizens of some of the municipalities served by defendant have worked for the establishment of municipally owned electric facilities. Otter Tail has opposed such movements and has refused to sell power at wholesale, or to "wheel"[1] power, to its former municipal customers who have converted or who seek to convert to municipal systems. Plaintiff claims this violates the Sherman Act. Defendant asserts this is but the exercise of proper business judgment aimed at protecting the integrity of its business.

The pleadings more particularly shape the issue. The government alleges that Otter Tail has sought to prevent the municipalities from shifting local electric service from defendant to other electric power systems, supplied either by Otter Tail or another supplier of power, by the following acts:

1. By refusing and threatening to refuse to sell power at wholesale to the proposed alternative local electric power system;

2. By refusing and threatening to refuse to wheel electric power from other wholesale suppliers to the proposed alternative local electric power system; and

3. By engaging in other activities designed to obstruct and defeat the attempt by municipalities to establish alternative local electric power system.

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[1] Wheel means to transport power for another supplier.

Otter Tail specifically denies that it has done anything in violation of Section 2 of the Sherman Act. In its Answer, paragraph IV, it

> "admits and alleges that it has refused to permit the use of Otter Tail's facilities (by furnishing either wholesale or wheeling service) to subsidize or support a new municipal electric system which is constructed for the purpose of ousting Otter Tail from the retail electric business in that municipality. Otter Tail also admits and alleges that it has attempted to use all reasonable means to continue in business, and to continue to furnish adequate and reliable service at reasonable rates at retail in the municipalities which are served by its integrated system, and in attempting to present its case that it is to their advantage not to sever their connection with Otter Tail's system and service."

The case was tried to the court June 1 through June 14, 1971. The parties stipulated to many of the facts. Plaintiff called eleven witnesses, the defendant three. Several extensive pretrial conferences preceded trial.

A summary of the facts essential to an understanding of the issue follows:

Otter Tail was incorporated in Minnesota in 1910. Its service area encompasses western Minnesota, northeastern South Dakota and eastern North Dakota. The company's integrated system consists of approximately 5,900 miles of interstate transmission lines which serve at retail, approximately 465 towns, mostly small communities of under 1,500 population. In 1969 Otter Tail sold 1,158,329 kilowatts (Kw.) of power to 103,829 customers, deriving a total operating revenue of $31,191,000. Otter Tail had a net generation capacity of 271,145 Kw. in 1969.

Otter Tail has entered into interconnection contracts with other electric systems. These contracts provide means by which the company can obtain power to supplement that provided by its own generation and sell excess power to others. One of Otter Tail's interconnections is with the United States Bureau of Reclamation. The relationship between the Bureau and Otter Tail is reflected in a comprehensive agreement which dates back to 1950. Pursuant to this contract, Otter Tail purchases a considerable volume of dump and secondary power from the Bureau.

Otter Tail is also directly interconnected with Minnesota Power and Light, Northern States Power Company, Northwestern Public Service Company, Montana-Dakota Utilities Company, Minnkota Power Cooperative, Central Power Association, United Power Association and several smaller rural electric cooperatives.

Generally speaking, Otter Tail provides retail service to municipalities pursuant to franchise agreements awarded to it by the city or town. By state law in each of the three states the franchises are non-exclusive and, depending upon the state, the franchise terms are limited to periods ranging from ten to twenty years. The franchises customarily grant Otter Tail the right to construct and maintain electric distribution systems and necessary transmission lines, and operate these within the regulations and provisions imposed by the municipal government.

Otter Tail also regularly engages in the business of wheeling power. A large proportion of Otter Tail's wheeling activity is done pursuant to its contractual relationship with the Bureau of Reclamation. Beginning in the 1930's Congress appropriated funds for the construction of a series of hydroelectric generation facilities along the Missouri River in

Montana, North Dakota and South Dakota. The Bureau of Reclamation of the Department of the Interior handles the marketing of the power generated by the facilities. Congress mandated that public bodies, REA electric cooperatives and municipal electric systems be designated as preference customers for this power; that is, that they be given first option to purchase the power.

The Congress also appropriated funds for the construction of high voltage transmission lines to transport Bureau power from the hydroelectric sites to the areas where the power was to be marketed.

In 1950 Otter Tail and the Bureau entered into the detailed contract which provided, *inter alia*, for the sale of dump power to Otter Tail and for the wheeling of Bureau power across Otter Tail transmission lines to preference customers. The Bureau pays a set wheeling fee to Otter Tail for this service. At the request of Otter Tail, a renewal contract dated June 14, 1955 contained language which, in the defendant's view, exempted it from any obligation to wheel power to towns which it previously had served at retail. Otter Tail does wheel power to 18 municipal preference customers which it has not previously served at retail. More background facts will be recited in connection with the court's consideration of the issues.

The principal thrust of the government's case is that Otter Tail has a monopoly on the retail distribution and sale of power to towns in its operating area. It is not contended that defendant acted illegally or improperly in *achieving* this claimed monopoly position but rather in its actions seeking to *preserve* this position. Specifically, it is urged that Otter Tail's refusal to sell or wheel power to towns desiring to establish municipal systems, and its actions participating in local

municipal power political campaigns, and sponsoring, encouraging, and financially supporting court litigation are all intended to impede and frustrate attempts to establish independent municipal electric systems.

Otter Tail does not deny its refusal to sell or wheel power to municipalities which it formerly served at retail but argues that to supply power to these municipalities would aid in its own demise. It admits its participation in local municipal political campaigns and in litigation surrounding attempts to establish municipal systems but contends this is proper and legal conduct. Such actions were taken, defendant argues, to preserve the electric power free enterprise system for the benefit of its customers, shareholders and employees.

Otter Tail denies that it has a monopoly, is attempting to preserve a monopoly, or that it possesses a dominant share of the pertinent market under Sherman Act principles. Defendant points to the many other electric power entities operating in the same area, particularly the United States Bureau of Reclamation, many electric cooperatives, Northern States Power Company, and other private power sources, from one or more of which electric power and the means of transmitting this power are readily available to those municipalities which defendant does not choose to serve.

Otter Tail finally urges a "Rule of Reason" and argues that its conduct is fully justified by its legitimate right to fight for its corporate life, remain viable in serving the public and prevent the erosion of its integrated system and the impairment of its credit.

A monopoly condemned by the Sherman Act is the power to fix prices or exclude competition coupled with policies designed to use or preserve that power. The United States Supreme Court in its most recent decision on the question, *United*

*States v. Grinnell Corp.*, 384 U.S. 563, 570, 86 S. Ct. 1698, (1966), said:

> The offence of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from the growth or development of a superior product, business acumen or historic accident.

The two principal questions involved are: (1) Does Otter Tail possess monopoly power, and (2) Has it sought to maintain that power?

The term relevant market consists of both a product market and a geographic market. *Grinnell*, supra. It is not disputed here that the product market is the sale of electric power at retail. Indeed more than 90% of Otter Tail's income is from retail sales.

There is dispute as to the definition of the geographic market. The government contends that each of the 465 towns served by Otter Tail constitutes a separate geographic market. If this not be accepted, the government urges that the geographic market is, at least, the towns in the Otter Tail service area.

There is some logical basis for considering each town a separate geographic market; but viewing it in a broader light, there are, in the Otter Tail service area, 465 towns served by Otter Tail and 45 towns served by municipal electric systems. On this basis it may be concluded that Otter Tail services approximately 91% of the relevant geographical market, certainly enough to justify the inference that the defendant possesses monopoly power in the area.

There are also 105 towns served by rural cooperatives in the Otter Tail service area. Because of congressional restrictions upon REA loans to cooperatives seeking to serve urban areas, it is doubtful that the 105 towns could be viewed as competitive and hence considered in determining Otter Tail's share of the total relevant market. But even if these 105 are considered as part of the market, the result still has Otter Tail serving 465 of the 615 towns in the area. This is 75.6 percent of the relevant market. In our view this percentage is sufficient to justify the inference that Otter Tail possesses monopoly power in the area.[2]

Having found that Otter Tail does possess monopoly power, the second question is whether Otter Tail has sought to *maintain* that power. A principal contention of the government is that the defendant has been able to maintain this power because of its strategic dominance of transmission capacity in most of the Otter Tail area.

Several map exhibits in evidence reflect a maze of electric power lines covering, almost blanketing it would seem, the entire Otter Tail service area. Defendant urges that its transmission lines represent only 8% of the transmission lines of all power suppliers in the area.

Evidence at trial showed that electric power lines fall into three general categories:

(1) *Bulk power supply lines*, usually of a voltage of 115 Kv. or greater, which are intended to move large blocks of power from generating facilities to load centers.

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[2] (1) *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S. Ct. 1125 (1946); (2) *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521, 74 S. Ct. 699 (1954); (3) *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1699 (1966); (4) *United States v. E. I. du Pont de Nemours & Co.* (Cellophane), 351 U.S. 377, 76 S. Ct. 994 (1956).

(2) *Subtransmission lines*, usually of a voltage from 34.5 Kv. to 69 Kv. These are utilized to move power from the bulk power source to local retail distribution systems.

(3) *Distribution lines*, usually of a voltage of 12.5 Kv. or less, which move the power from the subtransmission network station to the ultimate consumer.

Most of the bulk supply lines in the Otter Tail area are owned and operated by the Bureau of Reclamation. The Bureau does not main its own subtransmission system but contracts with Otter Tail, and others, to transmit the power from bulk supply stations over their subtransmission lines to local retail distribution systems whence it is stepped down for delivery via distribution lines to customers.

About two-thirds of Otter Tail's total electric line mileage, or 4,036 miles, consists of 41.6 Kv. subtransmission lines. It appears that Otter Tail is dominate in operation of subtransmission lines in the area.

The contract between Otter Tail and the Bureau contains a provision [Para. 27(e)(2)] which Otter Tail interprets as meaning that it need not wheel Bureau power over its subtransmission lines to its former retail customers. Otter Tail refuses to do so, the Bureau does not have its own subtransmission lines to use for that purpose and the transmission lines of others are not readily available in the area sought to be served. Hence many potential preference customers of the Bureau, including municipalities, are unable to obtain Bureau power because of the absence of available subtransmission lines and the refusal of Otter Tail to wheel that power over its lines. It is not economically feasible or practical for a municipality to construct its own subtransmission lines.

In support of its argument that Otter Tail does not have a dominance of transmission facilities, defendant showed at

trial that 87,000 miles of electric power lines in the Otter Tail service area are owned by various rural distribution electric cooperatives. This testimony and other evidence established, however, that most of these lines are of a voltage of 12.5 Kv. and hence suitable only for *distribution* to the customer and not for *transmission*, which requires a heavier voltage, in the range of 34 to 69 Kv.

One of defendant's witnesses at trial, Mr. Nye, testified that the 12.5 Kv. cooperative lines in the vicinity of *Elbow Lake* and *Hankinson*, (two municipalities here involved and concerning which more will be said later) were not capable of transmitting power to these towns.

Northern States Power Company (NSP) does distribute retail power in some towns near the Otter Tail service area but it refuses to supply power to towns not in its own service area. For this reason NSP refused to supply Alexandria, Minnesota, and Coleman, South Dakota. Hence NSP is not an available power source for municipalities refused service by Otter Tail and desiring to convert to municipal ownership.

We conclude that Otter Tail has a strategic dominance in the transmission of power in most of its service area.

Much of the evidence at trial was directed to the claimed employment of this dominance in transmission to prevent municipalities in the area from obtaining power to operate municipally owned systems. The testimony dealt principally with five towns, Elbow Lake, Minnesota, Hankinson and Finley, North Dakota, and Colman and Aurora, South Dakota, with the emphasis on happenings at Elbow Lake and Hankinson. A summary of events at each of these towns follows:

Elbow Lake, Minnesota, is a small county seat town near Fergus Falls. Elbow Lake was served at retail by Otter Tail until 1966 when the citizens voted for a municipally owned

system. The defendant refused to furnish power at wholesale. Elbow Lake acquired its own generating plant. It sought stand-by power from Otter Tail which was refused. Litigation ensued. The Federal Power Commission ordered the defendant to furnish stand-by power. The Court of Appeals of the Eighth Circuit affirmed. *Otter Tail Power Co. v. Federal Power Commission*, 429 F. 2d 232 (8th Cir. 1970).

When Otter Tail refused to sell power to Elbow Lake, the town sought power, either as a sole source or on a stand-by basis, from the Bureau of Reclamation, the United Power Association, the Basin Electric Power Cooperative and the Runestone Electric Association.

Each of these sources was willing and able to furnish the power, but could not, as the power could only be delivered to Elbow Lake over Otter Tail's transmission lines, because of the restrictive provisions contained in the contracts between Otter Tail and the suppliers previously discussed, and because of Otter Tail's refusal to wheel the power. It was, and is economically unfeasible, for either Elbow Lake or the suppliers to build the required transmission facilities from the power source to Elbow Lake.

From all of the evidence, of which this is a short precis, the court concludes that Otter Tail employed its dominance in transmission in the Elbow Lake area to prevent Elbow Lake from obtaining electric power from outside sources of supply.

Otter Tail served Hankinson, North Dakota, with electric power under a 20-year franchise dated February 16, 1931. In 1947 the voters of Hankinson approved the establishment of a municipal electric system. Otter Tail refused to sell power at wholesale to Hankinson. The town sought power from the United States Bureau of Reclamation, the Basin Electric Power Cooperative and the RSR Electric Cooperatives. All

three of these suppliers were dependent on the use of Otter Tail's transmission lines in transporting power from the nearest Bureau substation at Forman, North Dakota, some 39 miles from Hankinson. Otter Tail refused to wheel power over its lines to Hankinson. Again, it was not feasible for Hankinson to construct its own transmission lines 39 miles to Forman. The Bureau was unable to do so for the same reason, with the result that Otter Tail's conduct prevented Hankinson from obtaining needed power to service a municipally owned system. The town abandoned its efforts and granted a new retail franchise to the defendant.

On the basis of the above the court finds that defendant has a monopoly in the relevant market and has consistently refused to deal with municipalities which desired to establish municipally owned systems on the alleged justification that to do so would impair its position of dominance in selling power at retail to towns in its service area. The court concludes that this conduct is prohibited by the Sherman Act. It is well established that the unilateral refusal to deal with another, motivated by a purpose to preserve a monopoly position, is illegal. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S. Ct. 400 (1927); *Lorain Journal Co. v. United States*, 342 U.S. 143, 72 S. Ct. 181 (1951).

Here the defendant does not dispute that its purpose in refusing to deal with municipalities desiring to establish municipally owned systems is to protect itself in the position it now enjoys in the area. Such is a monopoly position, and the law prohibits conduct such as this when such is intended to preserve the monopoly.

A similar "refusal to deal" case was decided in this district in 1945, *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32, 39 (D. Minn. 1945). There Judge Nordbye capsulized

the legal principle involved when he held that "A refusal to sell, while it may be lawful *per se*, cannot be used in order to achieve an illegal result."

Here Otter Tail refuses to sell power to municipalities which would thereby take retail power business from defendant and refuses to wheel power for others willing to sell to these municipalities. Because of its dominant position Otter Tail is able to deprive towns of the benefits of competition which would result from municipally owned facilities.

Pertinent to an examination of the law is a reference to cases expressive of the "bottleneck theory" of antitrust law. This theory reflects in essence that it is an illegal restraint of trade for a party to foreclose others from the use of a scarce facility. Here the theory finds application in Otter Tail's use of its subtransmission lines. One authority believes:

> "The Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms."[4]

This statement epitomizes the holdings in federal cases which have established the principle: *United States v. Terminal Railroad Assoc.*, 224 U.S. 383, 32 S. Ct. 507 (1912); *Gamco, Inc. v. Providence Fruit & Produce Building Inc.*, 194 F. 2d 484 (1st Cir. 1952); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F. 2d 708 (3rd Cir. 1958); *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F. 2d 478 (5th Cir. 1966).

The bottleneck principle is applicable to Otter Tail. Its control over transmission facilities in much of its service area

[4] *A. D. Neale, The Antitrust Laws of the U.S.A.*, Cambridge University Press at 67 (1960).

gives it substantial effective control over potential competition from municipal ownership. By its refusal to sell or wheel power, defendant prevents that competition from surfacing.

## COURT LITIGATION

The efforts of Elbow Lake, Hankinson, Aurora and Colman, South Dakota, to establish municipal power systems were opposed by the defendant in court proceedings. Otter Tail either instituted or sponsored and financially supported court litigation which had the effect of frustrating the sale of revenue bonds to finance the municipal systems. A "no-litigation certificate," reflecting the absence of litigation which might impair the salability of revenue bonds, is essential to a successful sale of municipal bonds. The pendency of litigation has the effect of preventing the marketing of the necessary bonds thus preventing the establishment of a municipal system.

Most of the litigation sponsored by the defendant was carried to the highest available appellate court and although all of it was unsuccessful on the merits,[8] the institution and maintenance of it had the effect of halting, or appreciably slowing, efforts for municipal ownership. The delay thus occasioned and the large financial burden imposed on the town's limited treasury dampened local enthusiasm for public ownership. In some instances, Otter Tail made offers to the towns to absorb the towns' costs and expenses, and enhance the quality of its service in exchange for a new franchise. Hankinson, after several years of abortive effort, accepted this type of offer and renewed defendant's franchise.

While every person has the right to resort to the courts to redress claimed wrongs, the right is not without limitation. One who enjoys a monopoly may not resort to litigation for

[8] With the possible exception of litigation in Aurora where the court held that Otter Tail had no standing to sue.

the purpose of illegally maintaining the monopoly. The Nint Circuit has observed that "* * * litigation can be an integr part of a scheme prohibited by the Sherman Act." *Truckin Unlimited v. California Motor Transport Co.*, 432 F. 2d 75 760 (9th Cir. 1970).

This legal principle is well established and has been ex pressed in patent cases particularly in connection with th institution of infringement suits. *See Walker Process Equip ment Inc. v. Food Machinery & Chemical Co.*, 382 U.S. 17 86 S. Ct. 347 (1965); *Plastic Contact Lens Co. v. Butterfield* 366 F. 2d 388 (9th Cir. 1966); *Kobe, Inc. v. Dempsey Pum Co.*, 198 F. 2d 416, 424 (10th Cir. 1952).

In *Kobe*, supra, the court said:

> "* * * we must not permit the courts to be a vehi cle for maintaining and carrying out an unlawful monop oly which has for its purpose the elimination and preven tion of competition."

The court finds that the litigation sponsored by defendan was instituted for the purpose of delaying and preventing th establishment of municipal electric systems with the expecta tion that this would preserve its predominant position in th sale and transmission of electric power in the area.

Defendant urges that the so-called *Noerr* doctrine, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127, 81 S. Ct. 523 (1961), exempts its conduct in th field of court litigation from antitrust attack.

But the *Noerr* principle is applicable only to efforts aimed at influencing the legislative and executive branches of th government. It only immunizes political activity directed toward the enactment and enforcement of the laws from anti-trust attack. See *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F. 2d 1286 (5th Cir. 1971), and

*Trucking Unlimited v. California Motor Transport Co.*, supra. *Noerr* does not free from antitrust sanctions the institution of court litigation.

From all of the evidence it appears that defendant, by refusing to deal with municipalities and by conducting or sponsoring court litigation, has violated Section 2 of the Sherman Act and monopolized or attempted to monopolize the sale of electrict power in its service area.

## IMMUNITY AS A RESULT OF "VALID GOVERNMENT ACTION"

But Otter Tail takes the position that since it contracted with government agencies with reference to the delivery of power, it is thereby immune from antitrust sanctions.

It will be recalled that Otter Tail's agreement with the Bureau of Reclamation contains a provision which defendant interprets as freeing it from any obligation to wheel power from the Bureau to any municipality which received retail service from Otter Tail as of the date of the contract, that is, June 14, 1955. Further, Otter Tail's transmission agreements with certain cooperatives (Cooperative Power Association, Lyon-Lincoln Electric Cooperative, Inc. and Traverse Electric Cooperative, Inc., RSR Electric Cooperative, Inc. and East River Cooperative, Inc.) contain provisions which prohibit the use of defendant's transmission system to supply power from the cooperatives to a retail customer served by Otter Tail. These contracts also extend the same prohibition with respect to customers served by the cooperatives.

It is urged by Otter Tail that these restrictive provisions are immune from antitrust attack. The gist of this contention seems to be that since the Bureau is a government instrumentality and the REA administrator approved the contracts with the cooperatives, the contracts are the result of "valid govern-

mental action," thus falling within the scope of *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, 394 F. 2d 672 (5th Cir. 1968).

In my view there is no merit in this contention. The *Alabama Power* case is inapposite. The restrictive provisions here are, in reality, territorial allocation schemes. Agreements among competitors to allocate customers or territories are *per se* violations of the Sherman Antitrust Act. *Northern Pacific Railroad v. United States*, 356 U.S. 1, 78 S. Ct. 514 (1958). Our Eighth Circuit has held to the same effect. *Montana-Dakota Utilities Co. v. Williams Electric Cooperative, Inc.*, 263 F. 2d 431 (8th Cir. 1959). There the court condemned a contract provision between an investor-owned utility and a rural electric cooperative allocating marketing territories as a *per se* antitrust violation. The court said:

> By the great weight of authority in this country, the rule has been promulgated and consistently applied that contracts between quasi-public corporations, having for their object the division of territory between such companies, are against public policy, and being so, are absolutely void, untempered by any application of the 'rule of reason.' *Montana-Dakota Utilities* at 434.

A recent decision of the Court of Appeals for the District of Columbia Circuit, *Hecht v. Pro Football, Inc.*, —— F. 2d —— (D.C. Cir. 1971) held that a public armory board, in leasing a public stadium to a professional football team exclusively for a period of 30 years, was not immune from the antitrust laws.

In *Hecht*, the court held that in order for antitrust immunity to attach to action by a governmental body there must be specific and unequivocal language to this effect in the enabling statute.

"The basic philosophy of our antitrust policy has been so long established, is of such recognized economic importance, and has assumed in the statutory scheme of things such high dignity that a contrary Congressional intent of 'immunity from antitrust laws is not lightly implied.'" *Hecht* at ——.

There is nothing in any of the legislation under which either the Bureau of Reclamation markets its power or the rural electric cooperatives operate which either expressly or impliedly confers immunity from antitrust laws upon the actions of the Bureau in negotiating contracts for sale of power or upon the action of the REA administrator in approving contracts between a cooperative and a private power company.

The record reflects it was reluctantly, and only after a determination that no other transmission facilities were available, that the Bureau signed the contract with defendant which contained the restrictive provision in question. In addition, the Bureau interpretation of the contract varies from that of the defendant. The Bureau officials were and are of the view that the provision is not a blanket restriction but requires the defendant to give separate consideration and to reach separate judgment as to each applicant for transmission service over defendant's lines.

In order for antitrust immunity to attach in situations of this kind there must be a clear indication that Congress, in enacting the law, considered the competing interests of antitrust policies and whatever policy is best served by the other competing interest, and expressed a clear judgment that the antitrust policy should be suspended. There is no such showing here. No antitrust immunity attached to the contracts or to the parties executing them.

That which defendant refers to as the "heart of the case" is its argument that if Otter Tail is required to sell power at wholesale or wheel power to its former retail customers, it will be contributing to its own corporate death because more and more municipalities would then change to municipal ownership to obtain the cheaper Bureau power. Eventually, defendant claims, most of its customers would convert and the Otter Tail system would be eroded to the detriment of its customers, stockholders and employees. This argument was pressed hard by defendant and its president, Albert Hartl, who testified vigorously and eloquently in defense of privately owned utilities vis-a-vis public power interests.

Of course, it should be remembered that a public utility which operates without exclusive franchises from its customers does not have a right to be free of competition. *Rural Electrification Administration v. Central Louisiana Electric Company*, 354 F. 2d 859 (5th Cir. 1966). This has long been the law and extends to competition from municipally owned facilities. *Alabama Power Co. v. Ickes*, 302 U.S. 464, 58 S. Ct. 300 (1938).

One principal purpose of the Sherman Act is to insure competition. Otter Tail cannot violate the law albeit its avowed purpose is to protect the integrity of its business.

The Supreme Court recently held that the Schwinn Bicycle Company could not employ anti-competitive methods in order to preserve its business which was gradually but markedly going downhill. *United States v. Arnold Schwinn and Co.*, 388 U.S. 365, 375, 87 S. Ct. 1856 (1967). The court said:

> "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct."

So here there appears to be no legal justification for conduct which violates the Sherman Act.

A so-called "erosion study" (DX 41) offered by defendant

sought to fortell its financial disaster if it is required to serve its former customers which convert to municipal operation.

The pessimistic view of the matter suggested by the defendant is not supported by the record. The Bureau of Reclamation now furnishes power to only two towns previously served by Otter Tail, to wit, Colman and Aurora, South Dakota. Elbow Lake also has an allocation of power for future use. The Bureau's generating capacity is now fully committed, it has denied requests for allocation of power from several applicants, including Sioux City and Aurelia, Iowa, and no new generating capacity is scheduled to be activated. It is not unlikely that some present Bureau customers will have to find a continued power source elsewhere. All in all, it does not appear that Bureau of Reclamation power is a serious threat to the defendant nor that it will be in the foreseeable future.

But regardless, as stated, even the threat of losing business does not justify or excuse violating the law.

The court finds from a preponderance of the evidence that the defendant has attempted to monopolize, and has monopolized, interstate commerce in the retail distribution of electric power in violation of Section 2 of the Sherman Act.

NOW THEREFORE, the defendant and its agents are enjoined from any and all conduct, whether expressed in terms of contracts, policies, or practices, having the effect of continuing the violations of the Sherman Act herein found to exist.

Plaintiffs' counsel shall promptly present suggested detailed Findings of Fact, Conclusions of Law and Order for Judgment reflective of these expressions together with a form of Judgment.

Dated: September 9, 1971.

EDWARD J. DEVITT
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

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(Title Omitted in Printing)

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In this Section 2 Sherman Act case, tried to the Court June 1, 1971 through June 14, 1971, the Court makes Findings of Fact and Conclusions of Law in supplement of its Memorandum and Order of September 9, 1971, as follows:

## I. JURISDICTION

1. This is an action brought by the United States under Section 4 and Section 2 of the Sherman Antitrust Act (15 U.S.C. §§ 4, 2).

2. Otter Tail Power Company (hereinafter "Otter Tail"), an investor-owned electric utility, is a corporation organized and existing under the laws of the State of Minnesota, with its principal place of business in Fergus Falls, Minnesota. [Ans., part I]. It maintains offices, transacts business and may be found within the District of Minnesota, Sixth Division [Ans., part I].

3. Otter Tail is engaged in interstate commerce within the meaning of Section 2 of the Sherman Act. Otter Tail engages in the generation, transmission and distribution of electric power and energy for municipalities, rural customers, rural electric cooperatives and investor-owned utilities located gen-

erally in western Minnesota, eastern North Dakota, and northeastern South Dakota. Otter Tail, an integrated transmission system, delivers power across state lines to customers throughout this tri-state area. [Ans., part I]. 44% of Otter Tail's customers are located in Minnesota, 46% in North Dakota and 10% in South Dakota. [DX 95, Schedule 2].

## II. DESCRIPTION OF OTTER TAIL POWER COMPANY

4. Otter Tail operates an integrated electric system. Its generating stations are linked together and connected to its customers by an extensive network of transmission lines over which power is delivered to its customers. [Ans., part I; Hartl Tr. VI; p. 123]. In 1970 Otter Tail operated generating units with a net generation capacity of 272,245 kilowatts; its 1969 capacity was 271,145 kilowatts. [GX 426, p. 23]. In 1970 Otter Tail's transmission system consisted of 5,992 miles of line of varying voltages. [GX 426, p. 22].

5. In 1970 Otter Tail sold 1,321,998,594 kilowatt-hours (kwh) of electric power to 104,316 customers, for which it received total electric revenue of $34,153,292. [DX 95, Schedule 1]. In 1969 Otter Tail sold 1,158,379 kwh of electric power to 103,829 customers from which it received total electric revenue of $31,191,000. (GX 426, p. 22]. Otter Tail's electric revenues have steadily increased since the company's inception in 1907. During the decade 1960-1970 Otter Tail's revenue from the sale of electric power and energy increased from $19,945,762 to $34,153,192, an increase of approximately 70% [DX 95, Schedule 1].

6. Otter Tail's electric system is physically interconnected with other electric suppliers, including privately owned utilities, rural electric cooperatives, the Bureau of Reclamation

(hereinafter "Bureau") and municipal electric systems. These interconnections permit Otter Tail to purchase electric power to supplement that provided by its own generation as well as to sell and wheel power to the other electric systems, and they provide a means to increase reliability of service. [Hartl Tr. VI; pp. 123-125].

7. There are 14 interconnections between Otter Tail's electric system and that of the Bureau. [GX 443]. The Otter Tail-Bureau interconnections provide a means for Otter Tail to purchase electric power and energy from the Bureau. Otter Tail has purchased substantial amounts of electric power and energy from the Bureau each year beginning in 1955. In 1970 Otter Tail purchased 274,042,381 kilowatt-hours of electric energy from the Bureau at a total cost of $1,242,533.49. [GX 2, p. 4; GX 211, p. 24].

8. Otter Tail is a charter member of the Upper Mississippi Valley Power Pool which consists of 13 electric power suppliers located in several different states. The pool coordinates the planning of new generation and transmission and provides a means for the members to sell power to each other [GX 23 through GX 37]. Otter Tail is also a charter member of Mid-Continent Area Power Planners (MAPP), an organization consisting of 54 utilities operating in ten states in the Upper Midwest. The purpose of MAPP is to plan and coordinate the scheduling and construction of production and transmission facilities in the ten-state area. [Hartl Tr. VII; pp. 8-9]. Otter Tail has willingly coordinated and interconnected its electric facilities with those of other electric utilities through separate agreements with other electric suppliers. [Hartl Tr. VII; p. 9].

## III. CHRONOLOGY OF EVENTS IN TOWNS WHICH ATTEMPTED TO ESTABLISH MUNICIPAL ELECTRIC SYSTEMS

### A. *Elbow Lake, Minnesota*

9. Elbow Lake renewed Otter Tail's franchise to serve the village on July 30, 1940 for a twenty year term. [GX 85].

10. At a special election on September 2, 1949 the voters of Elbow Lake approved establishment of a municipal electric system by a vote of 452 Yes and 130 No. [GX 2, p. 2].

11. On March 1, 1950, the Village Council accepted the bids of several companies to supply the equipment for and construct the municipal electric system, including the bid of Fairbanks, Morse & Company to supply the diesel generators which would supply the power for the proposed municipal electric system. [GX 87, p. 9].

12. On March 29, 1950, Otter Tail advised Elbow Lake that it would not sell its distribution system in the village. [GX 86].

13. On April 24, 1950, the Village Council passed a resolution approving the issuance and sale of $275,000 in revenue certificates to finance construction of the municipal electric system, and set May 16, 1950 as the deadline by which interested parties had to submit bids to purchase them. [GX 87, p. 12].

14. On May 12, 1950, Otter Tail, and three Elbow Lake residents filed a suit against Elbow Lake seeking to enjoin the sale of the revenue certificates and the construction of the municipal electric system. The complaint alleged, *inter alia*, (1) that the engineer's proposal for construction of the municipal system contained specifications and designs which were too vague, indefinite and restricted as to preclude competitive bidding; (2) that the bids accepted and the contracts

negotiated pursuant to the engineer's proposal were therefore null and void; (3) that Elbow Lake acted illegally in negotiating a contract covering the purchase of a watt-meter because the lowest responsible bidder was not chosen; (4) that Elbow Lake acted illegally in accepting the bid for the generating equipment inasmuch as only one company submitted a bid; and (5) that the revenue certificates did not contain language sufficient to protect Elbow Lake from general liability in the event the Village failed to perform acts agreed upon under the terms of the certificate. [GX 87].

15. On May 13, 1950, the court issued a temporary restraining order against Elbow Lake. [GX 88].

16. On September 11, 1950, the trial court ruled in favor of Elbow Lake and dissolved the temporary restraining order. The court specifically ruled that (1) the engineer's specifications did not limit competitive bidding, (2) all contracts entered into were proper and legal, and (3) the revenue certificates contained protective language sufficient to shield the Village from general liability on the certificates. [GX 89].

17. Otter Tail appealed the trial court's decision, and on June 22, 1951 the Supreme Court of Minnesota unanimously affirmed the trial court's decision. The Court specifically rejected Otter Tail's argument, holding that (1) a municipality is not bound under state law to accept the lowest bid submitted, but rather is bound to accept the lowest responsible bid which involves considerations of quality, suitability and price; (2) there was ample evidence supporting Elbow Lake's contention that the engineer's specifications were drawn so as to allow competitive bidding; (3) the Village did not act improperly in accepting the only submitted bid for generating equipment; and (4) the revenue certificates did not create a general liability of the Village. [GX 90].

18. On September 8, 1952, Otter Tail offered to pay Elbow Lake $14,000 to reimburse the Village for the expenses incurred in its effort to establish a municipal system, on condition that Elbow Lake abandon its efforts to establish a municipal system and sign a new street light contract. The same day the Village Council accepted this settlement offer. [GX 295].

19. On June 6, 1960, Otter Tail requested the Village Council to grant Otter Tail a new franchise and sign a new municipal service contract. The Council refused to approve the new franchise and Otter Tail's franchise to serve Elbow Lake expired on July 30, 1960. [GX 296, p. 1; GX 2, Schedule A, p. 23].

20. On September 5, 1961, the Village Council retained K. B. MacKichan & Associates (MacKichan) to prepare an engineering feasibility study of a municipal electric system in Elbow Lake. [GX 296, p. 4]. On November 24, 1961, MacKichan submitted its engineering report to the Village Council. The report concluded that a municipal electric system would be feasible and economical and analyzed eight possible power supply arrangements, seven of which involved either buying the Otter Tail distribution system in the village or purchasing power at wholesale from Otter Tail or having Otter Tail wheel power from the Bureau of Reclamation to the village. The eighth alternative was that the Village construct its own generation and build a new distribution system. [GX 299].

21. Warren Nye, Vice President of Otter Tail, analyzed the MacKichan report and informed the company's district manager in Elbow Lake's area that the first seven power supply arrangements need not be considered because they required the cooperation of Otter Tail, thus leaving only the eighth alternative of construction of both a generating plant and a new distribution system by Elbow Lake. [GX 101].

22. On December 4, 1961, Otter Tail distributed a circular to the residents of Elbow Lake which criticized the MacKichan report. The circular further stated that Otter Tail would not sell power at wholesale to the town, that the town would have to construct a transmission line and other facilities costing up to $1,000,000 to receive power from the Bureau of Reclamation and that the only way Elbow Lake could get power for a municipal electric system would be to build a generating plant. [GX 111].

23. On December 22, 1961, the Village Council scheduled a special election for January 23, 1962 to decide whether to issue $715,000 of electric revenue certificates to finance construction of a municipal generation and distribution system. [GX 296, p. 5]. At the special election on January 23, 1962, the citizens of Elbow Lake approved a municipal electric system by a vote of 538 to 160. [GX 296, p. 7; GX 2, p. 2].

24. On February 17, 1962, Elbow Lake asked Otter Tail whether the company would discuss the sale of its distribution system in Elbow Lake and discuss the sale of power at wholesale to the Village. On February 26, 1962, Otter Tail responded that it had no interest in selling its distribution system to the Village nor would it sell power to Elbow Lake on a wholesale basis. [GX 91, GX 92].

25. On September 4, 1962, the Village Council approved the plans and specifications for the municipal power plant and the electrical distribution system prepared by K. B. MacKichan & Associates, and set October 1, 1962 as the date for receipt of construction bids. [GX 296, p. 15].

26. On October 1, 1962, three companies submitted bids to construct the electric distribution system and two companies submitted bids to construct the municipal power plant. On October 5, 1962, the Village Council awarded the contract

to construct the electric distribution system to Northolt Electric Company and awarded the contract to construct the municipal power plant to Fairbanks, Morse & Company. [GX 296, pp. 17-19].

27. On October 10, 1962, the Village Council approved a resolution calling for the issuance and sale of $670,000 of electric revenue certificates, and setting October 30, 1962 as the date for receipt of bids on the bonds. [GX 296, p. 20; GX 106, p. 6].

28. On October 29, 1962, Otter Tail and A. L. Anderson filed a lawsuit against the Village of Elbow Lake, the members of the Village Council, K. B. MacKichan & Company, Fairbanks, Morse & Company, and Northolt Electric Company seeking to enjoin the construction of the municipal electric system and the issuance and sale of the electric revenue certificates. The complaint alleged, *inter alia*, that (1) the plans and specifications for the municipal electric system were illegal because they restricted competitive bidding, (2) certain bids accepted by the Village did not conform with the plans and specifications, and (3) the prospectus for the sale of the bonds contained material misrepresentations. [GX 105].

29. As a result of Otter Tail's lawsuit filed the day before, no bidders appeared before the Village Council on October 30, 1962 to bid for the revenue certificates. [GX 296, p. 21].

30. On August 8, 1963, the trial court dismissed Otter Tail's lawsuit against Elbow Lake. The court held, *inter alia*, that (1) the contracts negotiated by Elbow Lake were in all respects proper and legal; (2) Elbow Lake exercised proper business judgment in accepting and awarding bids and (3) the plans and specifications were sufficiently precise to afford a proper basis for competitive bidding and were in all respects reasonable and proper. [GX 106].

31. On February 20, 1964, the trial court entered a judgment dismissing Otter Tail's complaint against Elbow Lake. On March 7, 1964, Otter Tail filed notice of appeal with the Minnesota Supreme Court. [DX 43, p. 1].

32. On May 4, 1964, during the pendency of the appeal, Mr. Hartl of Otter Tail made a settlement offer to the Mayor and Village Council to the effect that Otter Tail would reimburse the Village for all expenses incurred by it in connection with the municipal power project, install a new white way system, improve all other street lighting, make available the most favorable municipal pumping rate, and withdraw from litigation pending with the Village on condition that Elbow Lake grant Otter Tail a new franchise and sign a municipal services contract. [GX 93]. The Village rejected the offer.

33. On July 8, 1964, the Bureau of Reclamation allocated 205 KW of firm power to Elbow Lake. Elbow Lake had applied to the Bureau for an allocation on August 5, 1963. [GX 259; GX 214]. On August 5, 1964, Elbow Lake requested that the Bureau allot the Village more power, but on September 18, 1964, the Bureau advised the Village that the Bureau had no additional firm power available. [GX 260; GX 261].

34. On December 14, 1964, the Mayor of Elbow Lake asked the Bureau whether the Village could compel either Otter Tail or Runestone Electric Cooperative to wheel power from the Bureau to the Village and whether the Bureau would build, at its expense, a transmission line to deliver Bureau power to the Village. [GX 262]. On December 23, 1964, the Bureau responded and advised the Mayor that the Bureau would ask Otter Tail to wheel Bureau power to the Village once the plans for the municipal electric system were firmed up. The Bureau also advised the Village that the Bureau had no wheeling contract with Runestone Electric Cooperative. Finally, the Bu-

reau stated that to provide loop service to Elbow Lake would require construction of 113 miles of transmission line and that the Village would have to pay a major part of the costs to construct the line and associated facilities. [GX 263].

35. On February 5, 1965, the Minnesota Supreme Court unanimously affirmed the trial court's dismissal of Otter Tail's lawsuit against Elbow Lake. The court specifically held that (1) a municipality has the right to tailor engineering specifications to fit the community's needs and there was no evidence that the specifications were based on favoritism or fraud; (2) the evidence indicated that several manufacturers produced equipment meeting the specifications, and if they did not bid, it had to be presumed that they could not meet the competitive price; (3) the bid submitted by Fairbanks, Morse & Company embodied a sufficient warranty so that the bid complied with the plans and specifications; (4) the plans and specifications were sufficiently definite to permit competitive bidding and were legal and proper, and (5) there were no material misrepresentations in the prospectus. [GX 106A—Decision reported in 270 Minn. 262, 133 N.W. 2d 511].

36. The lawsuit filed by Otter Tail against Elbow Lake on October 29, 1962, delayed establishment of the municipal electric system in the village by two and one-half years.

37. At the Village Council meeting on February 9, 1965, Otter Tail's district manager presented a settlement proposal to the Council similar to the offer made by Mr. Hartl to the Village on May 4, 1964. The Village Council rejected the offer. He also advised the Council that Otter Tail would take no further legal action against the proposed municipal electric system. He further stated that Otter Tail would not sell power at wholesale or wheel power to the Village. [GX 296, p. 33].

38. On February 25, 1965, the Bureau advised Otter Tail that it had allocated power to Elbow Lake and was exploring ways of delivering power to the Village. The Bureau asked whether Otter Tail had sufficient excess capacity in its transmission system to permit it to wheel Bureau power to Elbow Lake. [GX 264].

39. On February 26, 1965, Mr. Hartl of Otter Tail repeated his settlement offer to the Mayor and Village Council. The offer was identical to the one Otter Tail had made on May 4, 1964 with the addition of an offer to place a three man area line crew in Elbow Lake and to construct an area service building in the Village. [GX 95].

40. On March 8, 1965, Ulteig Engineers, a consulting engineering company, submitted, at the request of Otter Tail, a report to the Village Council which recommended that the Village reconsider its decision to proceed with a municipal electric system and examine the benefits of continued retail service from Otter Tail. Otter Tail paid Ulteig for the preparation of the report. [GX 434; Hartl Depo. GX 287, pp. 280-81].

41. On April 6, 1965, the Village Council received bids for the purchase of $670,000 of revenue bonds to finance construction of the municipal electric system. The bid of E. J. Prescott & Co. was accepted. Otter Tail representatives at the meeting were asked whether Otter Tail would file any more lawsuits against the Village and they responded that Otter Tail would use any legal means to protect its investment in the Village. [GX 296, p. 26; GX 104].

42. On April 14, 1965, Otter Tail responded to the Bureau's request to wheel power to Elbow Lake. Otter Tail asserted that Section 27 of the Bureau-Otter Tail contract prohibited the use of Otter Tail's transmission facilities to wheel power to a town served at retail by Otter Tail. [GX 265].

43. On May 5, 1965, Elbow Lake informed the Bureau that it would soon start construction of its municipal electric system and asked what needed to be done to deliver the Village's allocation of Bureau power. [GX 267]. On May 27, 1965, the Bureau informed Elbow Lake that Otter Tail had refused to wheel Bureau power to the Village and thus the Bureau could not enter into a power service contract with Elbow Lake because no method of delivering the power to the Village had been found. [GX 268; GX 269].

44. On July 8, 1965, Elbow Lake asked United Power Association, (UPA), a generation and transmission cooperative located in Elk River, Minnesota to furnish electric service to Elbow Lake. [GX 297]. On July 16, 1965, UPA informed Otter Tail of Elbow Lake's request for power, and stated that UPA would not serve Elbow Lake without Otter Tail's consent and help in delivering the power because UPA had no transmission lines in the Elbow Lake area. [GX 107]. On July 23, 1965, Otter Tail advised UPA that it would not be in the best interests of the electric power industry to use Otter Tail's transmission facilities to wheel power to Elbow Lake. [GX 108]. On August 10, 1965, UPA advised Elbow Lake that it was unable to make the arrangements with other parties necessary to deliver power to the Village. [GX 298].

45. On March 16, 1966, Elbow Lake filed an application with the Federal Power Commission for an interconnection with the Otter Tail system. [GX 84, p. 6—Stipulation # 13].

46. In June 1966 construction of the municipal electric system in Elbow Lake was completed. The system was supplied with power from an isolated generating plant in Elbow Lake which has no interconnection with Otter Tail's system. [GX 84, pp. 5-6—Stipulations # 10 and 11].

47. On June 17, 1966, Elbow Lake advised the Bureau that the municipal electric system was operational and requested an extension of its allocation of Bureau power. On November 25, 1966, Elbow Lake again asked the Bureau for an extension of time to enter into a power contract with the Bureau. The Bureau granted an extension to June 30, 1967. [GX 271, 273, GX 274].

48. On December 7, 1966, Elbow Lake, at the suggestion of the Federal Power Commission staff trying to settle the FPC litigation between Elbow Lake and Otter Tail, again asked Otter Tail whether the company would negotiate to sell power at wholesale to the Village. On December 13, 1966, Otter Tail repeated its refusal to sell power at wholesale or wheel Bureau power to Elbow Lake. [GX 96; 97].

49. On April 28, 1967, Basin Electric Power Cooperative, in response to a request for power from Elbow Lake, advised the Village that Basin would sell power at wholesale to Elbow Lake. Basin stated that it could only deliver power at the nearest Bureau substation from which point Elbow Lake would have to arrange to have the power wheeled to its system. [GX 304]. On May 3, 1967, Elbow Lake informed Otter Tail of Basin's wholesale sale offer and requested Otter Tail to wheel the power to the Village. On May 11, 1969, Otter Tail again refused to wheel any power to Elbow Lake. [GX 305; GX 98].

50. On April 26, 1968, Elbow Lake asked the Department of Interior to request Runestone Electric Cooperative (Runestone) of Alexandria, Minnesota, which had a substation near Elbow Lake, to wheel Bureau power to the Village. On May 17, 1968, the Department of Interior advised Elbow Lake that the Bureau would investigate the possibility of delivering power to Elbow Lake through the Runestone system. [GX 276, GX 277].

51. On June 5, 1968, the Bureau again asked Otter Tail whether it would wheel power to Elbow Lake. On August 28, 1968, Otter Tail again notified the Bureau that it would not wheel power to Elbow Lake. [GX 278, GX 279].

52. On June 18, 1968, the Bureau informed Elbow Lake that Otter Tail's consent was necessary before Runestone could wheel Bureau power to Elbow Lake, because Runestone purchased its power from Cooperative Power Association (CPA) which in turn bought a large block of power from the Bureau. The Bureau emphasized that Bureau power delivered to CPA for Runestone had to be wheeled over Otter Tail's transmission lines. [GX 282].

53. On June 18, 1969, the Bureau asked Runestone whether it could arrange to wheel Bureau power to Elbow Lake. On July 22, 1968 Runestone advised the Bureau that a provision of the integrated transmission agreement between Otter Tail and Cooperative Power Association [GX 22] required that Otter Tail had to give its consent before Otter Tail's transmission facilities could be used to wheel power to a customer which Otter Tail served at retail on or after January 13, 1966. Runestone conveyed the same information to Elbow Lake on August 19, 1968. [GX 281, GX 344, GX 345].

54. On September 24, 1968, the Bureau advised Elbow Lake that the Bureau was unable to secure a means to deliver Bureau power to the Village, and that Otter Tail still refused to wheel. [GX 284].

55. On November 22, 1968, Runestone advised Elbow Lake that the only impediment preventing Runestone from wheeling Bureau power to Elbow Lake was the provision in the transmission agreement between Otter Tail and Cooperative Power Association, Runestone's supplier, which required Otter Tail's consent before Otter Tail's transmission facilities could be

used to serve a customer which had been served by Otter Tail on or after January 13, 1966. [GX 346].

56. On October 1, 1970, Elbow Lake again asked Runestone to discuss possible delivery of power to the Village. On October 6, 1970, Runestone informed Otter Tail of Elbow Lake's request and asked whether Runestone could negotiate to deliver power to Elbow Lake despite the fact that previous requests had been turned down on the basis of the provision in the Otter Tail-Cooperative Power Association contract. Mr. Hartl orally notified Runestone that Otter Tail would not answer its request. [GX 347, GX 348; Perino Tr. II, p. 102].

57. On March 29, 1971, Basin Electric Power Cooperative renewed its offer to sell power at wholesale to Elbow Lake at a rate higher than that offered in 1967. Basin also told Elbow Lake first to attempt to secure power at wholesale from the utility which would have to wheel Basin's power to the Village, namely Otter Tail. [GX 306].

58. Elbow Lake did not intend to build its own generating plant unless it was unable to obtain power from any other source. [Martinson Tr. I, pp. 118-119].

59. The proceeding before the Federal Power Commission commenced by Elbow Lake on March 16, 1966 to obtain an interconnection with Otter Tail is still continuing. The Commission has completed phase 1 of the proceeding and has ordered an emergency interconnection between Otter Tail and Elbow Lake's municipal electric system. Otter Tail appealed the Commission's ruling which was affirmed by the Eighth Circuit Court of Appeals in *Otter Tail Power Company v. Federal Power Commission*, 429 F. 2d 232 (8th Cir. 1970), cert. denied, 91 S. Ct. 923. On September 13, 1971, the Commission ordered Otter Tail to make a permanent interconnection with Elbow Lake.

B. *Hankinson, North Dakota*

60. Otter Tail obtained a 20 year franchise to distribute electric power at retail in Hankinson on February 16, 1931. [GX 115].

61. On May 19, 1947 the voters in Hankinson approved the establishment of a municipal electric system. [GX 2, p. 2]. No municipal system was developed and Otter Tail continued to serve the town at retail.

62. Hankinson did not renew Otter Tail's franchise when it expired on February 16, 1951. [GX 84, p. 7, Stipulation # 16].

63. On January 7, 1963 the City Council appointed a committee to investigate the feasibility of establishing a municipal electric system to serve Hankinson. [GX 311, pp. 9-10]. On August 12, 1963 the City Council retained North Central Engineers to prepare an engineering feasibility study of a municipal electric system. The report was submitted to the City Council on September 26, 1963 and concluded that a municipal electric system in Hankinson was economically feasible. [GX 315-316; GX 311, pp. 13-15; GX 84, p. 7, Stipulation # 19].

64. On September 30, 1963 Hankinson applied for an allocation of power from the Bureau of Reclamation. [GX 248, pp. 2-3].

65. On October 7, 1963 the City Council passed a resolution to schedule an election for October 22, 1963 to vote on the question of whether the City should issue $190,000 of electric revenue bonds to finance construction of a municipal electric system. [GX 314, pp. 2-4].

66. On October 11, 1963 Otter Tail informed the mayor of Hankinson that Otter Tail would not under any circumstances wheel power for Hankinson, for Central Power Elec-

tric Cooperative or for the Bureau of Reclamation for delivery to Hankinson, that Otter Tail would not supply wholesale or standby or supplemental power to Hankinson, and that Otter Tail would not sell its distribution system in Hankinson under any circumstances. [GX 117]. On October 15, 1963 Otter Tail told the mayor of Hankinson that the engineering feasibility report had several erroneous assumptions, including one that Otter Tail would sell power at wholesale. [GX 119].

67. On October 22, 1963 the residents of Hankinson approved the establishment of a municipal electric system by a vote of 442 to 211, and approved the issuance of $190,000 of electric revenue bonds to finance it by a vote of 440 to 213. [GX 311, pp. 16-18; GX 2, p. 2].

68. In 1963 Otter Tail owned the only subtransmission lines near Hankinson. The Bureau had a high voltage 230 kv bulk power supply transmission line approximately 39 miles from Hankinson at Forman, North Dakota. Otter Tail had a substation at Forman and two subtransmission lines running from Forman eastward past Hankinson. One of these was a 41.6 subtransmisison line which was connected to another substation adjacent to Hankinson which stepped the voltage down for retail distribution in Hankinson. [GX 206; GX 316, pp. 6-9].

69. RSR Electric Cooperative is a distribution cooperative and a member of Central Power Electric Cooperative, a generation and transmission cooperative. In 1963 RSR had a substation located on Otter Tail's transmission line about two miles from Hankinson to which Otter Tail wheeled power pursuant to a wheeling contract between Otter Tail and Central. RSR Electric Cooperative could not supply wholesale power or wheel power to Hankinson without using Otter Tail's

transmission lines. [GX 206; GX 343; GX 316, p. 7; GX 41-47; Belinsky Tr. II, pp. 97-98].

70. In October 1963 Hankinson applied for an allocation of power from the Bureau. On November 5, 1963 the Bureau advised Hankinson that it would study possible methods of delivering power to the city. [GX 248-249].

71. On October 28, 1963 Hankinson asked RSR Electric Cooperative to supply power to the proposed municipal electric system. On November 19, 1963 RSR offered to deliver power to Hankinson if the town were successful in establishing its own municipal distribution system. [GX 335].

72. On November 27, 1963 Hankinson asked Otter Tail whether it would discuss the possible sale of its distribution system to the city and the termination of its existing street lighting contract with the city, and whether it would wheel power to the city. On December 4, 1963 Otter Tail advised Hankinson that it would not sell its distribution system in Hankinson, would not wheel power, and saw no reason to terminate the street lighting contract. [GX 120, GX 121].

73. On January 24, 1964 Central Power Electric Cooperative completed a study of possible methods for RSR Electric Cooperative to supply power at wholesale to Hankinson. The study concluded that the best method was to have power wheeled over Otter Tail's lines to RSR's substation near Hankinson, because construction of a 39 mile radial line to connect with the Bureau's transmission line at Forman, North Dakota would result in poor service reliability, and because the construction of transmission lines to connect with any other power supplier was not economically feasible. [GX 334].

74. On February 17, 1964 the City Council passed a resolution to hire Maeir & Tompt Engineers to design a municipal electric system. [GX 311, pp. 23-26].

75. On April 20, 1964 Allison-Williams Company, an investment banking company hired by Hankinson in connection with the expected sale of the electric revenue bonds, advised Hankinson that the bonds could not be sold until the city entered into a firm contract with a supplier of wholesale power. [GX 336].

76. On May 14, 1964 Hankinson asked RSR Electric Cooperative to serve the town at wholesale and furnish the city with a proposed contract for such service. [GX 336].

77. On May 19, 1964 RSR requested Central Power Electric Cooperative to increase its power delivery to RSR so it could supply power at wholesale at Hankinson. On May 28, 1964 Central advised RSR that it would ask Otter Tail to increase the capacity of RSR's substation near Hankinson, but that Otter Tail probably would not wheel power for RSR if it was to be used to supply power at wholesale to Hankinson. [GX 337, GX 333].

78. On May 28, 1964 Central advised Otter Tail that RSR desired to increase the capacity of its Hankinson substation and asked if this was permissible under the wheeling contract between Central and Otter Tail. [GX 122].

79. On June 8, 1964 Otter Tail asked Central whether the proposed increase in substation capacity would be used to serve Hankinson. On June 10, 1964 Central notified RSR of Otter Tail's question. [GX 123-124].

80. On June 24, 1964 RSR notified Central that the increase in substation capacity related to long range plans for service in the area and was necessary because RSR's system was overloaded. On July 14, 1964 Central forwarded this explanation to Otter Tail. [GX 338, GX 124].

81. On July 24, 1964 Otter Tail advised Central that the company suspected that RSR intended to supply power to

Hankinson, and since Otter Tail served the city it would not agree to the increase in substation capacity. [GX 125].

82. On July 31, 1964 Central advised RSR that Otter Tail would not agree to increase the substation capacity if RSR used it to supply power to Hankinson, so RSR would have to make other transmission arrangements if it wanted to supply power at wholesale to Hankinson. [GX 332].

83. On July 8, 1964 the Bureau made an allocation of power to Hankinson. [GX 250; GX 214, p. 3].

84. On August 7, 1964 the Bureau asked Otter Tail to add the Hankinson load to the wheeling notice which the Bureau had sent to Otter Tail with service to Hankinson expected to commence in July 1965. [GX 251].

85. On September 30, 1964 Otter Tail advised the Bureau that Otter Tail would not wheel Bureau power to Hankinson, and that Article 27(c)(2) of the transmission agreement between the Bureau and Otter Tail limited Otter Tail's obligation to wheel only to towns which were not served at retail when the contract was signed. [GX 253].

86. On December 16, 1964 the Bureau advised Otter Tail that Article 27 specifically provided that the parties would attempt to negotiate a wheeling arrangement for any prospective Bureau preference customers, and again requested Otter Tail to wheel power to Hankinson. On March 5, 1965 Otter Tail responded to this request by repeating its refusal to use its transaction lines to serve a town already receiving service from Otter Tail. [GX 254-255].

87. On January 6, 1965 Hankinson's City Attorney met with Otter Tail officials and Otter Tail's attorney to discuss the methods of delivering power to the proposed municipal system in Hankinson then being considered by the city. Otter Tail indicated that the Bureau-Otter Tail transmission con-

tract limited Otter Tail's obligation to wheel only to towns which were not served at retail when the contract was signed in 1955, and that the transmission agreement between Otter Tail and Central Power Electric Cooperative was not intended to permit Central to take away an existing customer of Otter Tail. Otter Tail's attorney stated that the fact that Hankinson had become a member of Basin Electric Power Cooperative had no significance because there was no way to transmit power from Basin to the town. He further noted that the Bureau could not build a transmission line to serve Hankinson because it would require a congressional appropriation and was economically impractical, and that the Rural Electrification Administration was prohibited by law from loaning money to a cooperative to build a line to serve a town already receiving central station service. [GX 126-127].

88. On February 23, 1965 Hankinson's Bond Counsel advised the mayor that he could not issue a legal opinion necessary to sell the revenue bonds, because Otter Tail's refusal to wheel prevented the town from obtaining power which would be the source of revenue for the municipal system. He also noted the possibility of litigation with Otter Tail which would prevent sale of the bonds. [GX 357].

89. On March 29, 1965 Central Power Electric Cooperative advised Otter Tail that RSR Electric Cooperative had entered into a contract to sell power at wholesale to Hankinson, and asked whether Otter Tail would wheel the additional amount of power to RSR's substation near Hankinson. Central noted that Otter Tail had previously stated that it had sufficient transmission capacity in its lines to transmit the power to RSR's substation. [GX 331, p. 2; GX 128].

90. On April 14, 1965 Otter Tail advised Central that Otter

Tail would not wheel power to enable RSR to take away a town being served by Otter Tail. [GX 294].

91. On April 30, 1965 Central's manager notified his board of directors that the Rural Electrification Administration would not approve a long term contract for RSR to supply power at wholesale to Hankinson. On November 26, 1965 the Rural Electrification Administration informed RSR that it could not approve the proposed wholesale contract with Hankinson because there was no way to deliver power to the town. [GX 330; GX 342].

92. On August 2, 1965 the City Council unanimously passed a resolution to purchase from the Bureau the power allocated to the city, to request the Bureau to build a 39 mile transmission line from its nearest substation at Forman, North Dakota, and to request the Bureau to increase the allocation of power to the city. The resolution noted that Otter Tail had refused to wheel power to the city and that the REA had disapproved the proposed contract for RSR Electric Cooperative to sell power at wholesale to Hankinson. [GX 311, pp. 27-28; GX 312].

93. On August 12, 1965 Hankinson asked Otter Tail to provide information as to wholesale sales by Otter Tail to municipal systems, and asked whether Otter Tail would negotiate with the city regarding a wholesale sale. On August 16, 1965 Otter Tail advised Hankinson that it would not negotiate to make a wholesale sale to the city. [GX 129-130].

94. On October 14, 1965 the Bureau advised Hankinson that it was impractical for the Bureau to build a 39 mile transmission line from Forman to Hankinson, and that the Bureau's power commitment to the city was contingent upon arranging transmission of the power to the city. [GX 256].

95. On January 5, 1966 Hankinson filed a complaint with the North Dakota Public Service Commission seeking to compel Otter Tail to provide wholesale service and to wheel power to the city. On December 30, 1966 the Commission ruled that it lacked jurisdiction to grant the relief requested. [GX 131; GX 140].

96. On February 1, 1966 Hankinson filed a complaint with the Federal Power Commission seeking an order to compel Otter Tail to wheel power to the town. [GX 132].

97. On July 25, 1966 Roy P. Anderson, and others, filed a complaint in the state court against Hankinson and the City Council to enjoin the Council from spending city funds for the proposed municipal electric system (hereinafter referred to as the "Taxpayers Suit"). The complaint alleged, *inter alia*, that (1) expenditure of funds by the City Council to establish a municipal electric system was illegal, because state law prohibited a municipality from paying for a municipal electric system with funds obtained by taxation, and (2) expenditure of funds by the City Council to compel Otter Tail to sell power at wholesale or wheel power to Hankinson was illegal, because state law prohibited a municipality from leasing transmission facilities without first obtaining the permission of the electorate. [GX 133].

98. Otter Tail employees met with the Taxpayers Committee which brought the aforesaid lawsuit against Hankinson and stated that Otter Tail would absorb legal expenses incurred by the Committee. Otter Tail paid approximately $1,500 of the attorneys' fees for the lawsuit against Hankinson and the subsequent appeal to higher courts. [Hartl Tr. VIII: pp. 90-91; Nygard Depo. GX 289, pp. 34-35].

99. The court in the Taxpayers Suit issued a temporary restraining order against Hankinson but this was vacated on

August 25, 1966, because plaintiffs had not presented the requisite bond. On October 14, 1966 the court issued a temporary injunction and on January 27, 1967 the court issued a permanent injunction enjoining the city from spending any city funds for a municipal electric system. [GX 134-138].

100. Hankinson appealed the trial court's ruling, and on April 3, 1968, the North Dakota Supreme Court reversed the trial court, dissolved the permanent injunction and dismissed the action. [GX 139].

101. The Taxpayers Suit delayed establishment of the proposed municipal electric system over a year and a half.

102. On July 15, 1968, by a 4-3 vote, the Hankinson City Council voted to dismiss the city's complaint against Otter Tail filed with the Federal Power Commission and to dismiss the civil antitrust suit the City had filed against Otter Tail in federal district court in North Dakota. [GX 311, p. 40; GX 84, Stipulation #29].

103. On August 5, 1968 Otter Tail made an offer of settlement to the Hankinson City Council. Otter Tail offered to pay Hankinson for all unpaid attorney's fees owed by the city, all electrical engineering fees incurred by the city relating to the municipal electric system, and any litigation expense the city might incur in determining the amount of these fees, on condition that the City grant Otter Tail a ten year franchise to serve the City. [GX 141; GX 84, Stipulation #28].

104. Hankinson accepted Otter Tail's settlement offer, awarded Otter Tail a 10 year franchise effective on September 4, 1968, and notified the Bureau that the City no longer needed its allocation of power. [GX 311, pp. 42-43; GX 84, Stipulation #29; GX 257].

C. *Colman, South Dakota*

105. Otter Tail had distributed electric power at retail in Colman since 1941 when Otter Tail acquired the distribution system by merger with another company. [GX 84, p. 12—Stipulation #30].

106. Otter Tail's franchise to distribute electric power at retail in Colman expired on October 31, 1959 and was not renewed by the town. [GX 144; GX 84, p. 12—Stipulation #31].

107. In 1959 Colman applied for and received an allocation of 500 kilowatts of power from the Bureau of Reclamation. [GX 214, p. 5; GX 310, p. 5].

108. On December 11, 1959, Colman retained Buell & Winter Engineering Company to prepare an engineering feasibility study of a municipal electric system in Colman. [GX 309, p. 1; GX 84, p. 12—Stipulation #34].

109. On January 29, 1960, Buell & Winter asked Otter Tail's local district manager whether Otter Tail would sell its retail distribution system to Colman and would sell power at wholesale to the city. After discussing the request with the general office, the district manager on February 5, 1960 advised the Mayor of Colman that Otter Tail would not sell its distribution system, and that Otter Tail was primarily in the retail distribution business, but did make some wholesale sales of power. [GX 145, GX 146, GX 147].

110. On March 15, 1960, Buell & Winter asked Northern States Power Company (NSP), whether it would sell power at wholesale to Colman. NSP had a transmission line some 4 or 5 miles from Colman. On March 25, 1960, NSP informed the Mayor of Colman that it could not offer to sell power at wholesale to Colman, because the city was outside of NSP's service area and was being supplied with electric power at

retail by Otter Tail. [GX 300; GX 301; Spethmann Tr. II, p. 5].

111. On April 5, 1960 Buell & Winter submitted its engineering report which concluded that a municipal electric system in Colman was economically feasible. [GX 309].

112. On August 2, 1960, Colman's City Attorney asked Otter Tail whether it would sell its local distribution system to Colman. On August 3, 1960, Otter Tail declined to sell its distribution system to Colman. [GX 148; GX 149].

113. On November 21, 1960, the City Council passed Ordinance #48 which provided for the construction of a municipal electric system and the issuance of $95,000 of electric revenue bonds to finance it, and scheduled a special election to vote on the Ordinance for December 13, 1960. [GX 310, p. 14]. At the special election the voters approved Ordinance #48 to establish a municipal electric system by a vote of 229 to 53. [GX 310, p. 15; GX 84, p. 13—Stipulation #39].

114. On May 1, 1961, the City Council passed a resolution authorizing sale and delivery of the $95,000 of electric revenue bonds and set June 1, 1961 as the date for receipt of bids on the bonds. [GX 310, p. 17].

115. On May 8, 1961, the City Council set June 15, 1961 as the date for receipt of bids to construct the municipal electric system. [GX 310, p. 18].

116. On May 29, 1961, Otter Tail and Eugene Fritz, a resident of Colman and an employee of Otter Tail, filed a lawsuit in the local circuit court against Colman seeking to enjoin the city from negotiating and selling the electric revenue bonds, from establishing a municipal electric system, and from awarding any contracts for the construction of the municipal electric system. [GX 150; Hartl Depo. GX 287, pp. 180-81].

117. On June 1, 1961 two investment banking institutions submitted bids to purchase the electric revenue bonds, but Otter Tail's lawsuit made it impossible to accept a bid and consummate the sale. [GX 310, p. 19]. On June 15, 1961, six construction companies submitted bids to construct the municipal electric system and the City Council accepted the lowest bid of Knox Construction Company. On June 24, 1961, Colman notified Knox Construction Company that it had to reject the company's bid because of the pending lawsuit brought by Otter Tail. [GX 310, p. 20; GX 308].

118. On June 15, 1961, Otter Tail and Eugene Fritz filed an amended complaint in the lawsuit against Colman alleging, *inter alia*, that (1) Ordinance #48 was void because certain pre-election requirements had been disregarded; i.e., sufficient notice of the election; (2) the sale of revenue bonds would be illegal, because there was no assurance that the municipal system could be constructed and operated within the authorized amount of $95,000; (3) the sale of bonds would be illegal due to material variances between the language of Ordinance #48 and the language of the bond resolution; and (4) the engineer's plans and specifications did not form a proper basis for competitive bidding. [GX 151].

119. On October 21, 1961, the trial court dismissed Otter Tail's complaint against Colman and on January 15, 1962 Otter Tail filed notice of appeal to the Supreme Court of South Dakota. [GX 152; 153].

120. On November 27, 1962, the Mayor of Colman advised the Bureau that Colman expected to utilize its allocation of firm power within 12 months, and on February 11, 1963 the bureau advised Colman that its allocation of 500 kilowatts was being held for the town. [GX 237].

121. On May 9, 1963, the Supreme Court of South Dakota

unanimously ruled in favor of Colman and specifically ruled that the election approving Ordinance #48 was not invalid, and held that a validating act passed by the South Dakota Legislature in 1961 cured whatever procedural irregularities, if any, had occurred. The 1961 Validating Act had been passed by the South Dakota Legislature before Otter Tail filed its complaint on May 29, 1961 although the Act actually went into effect on July 1, 1961. [GX 154; Holten Tr. III, 18-19; the decision is reported in 121 NW 2d 483 (1963)]. Otter Tail's lawsuit against Colman delayed the establishment of the municipal electric system in Colman for two years.

122. On June 14, 1963, Colman's bond counsel advised the City Attorney that before the revenue bonds could be sold, Colman would have to furnish a certificate stating that no litigation was pending. [GX 365].

123. On July 11, 1963, a group of Colman citizens filed with the City Council an initiative petition calling for an election to repeal Ordinance #48 which authorized issuance of revenue bonds and construction of the municipal electric system. [GX 160, GX 310, p. 26].

124. On or about July 18, 1963, Otter Tail began to replace many of its existing poles in the city with taller poles. Otter Tail did not consult with or notify the city officials in Colman prior to installation of the taller poles in the town. Since the new municipal electric distribution system had to be constructed next to Otter Tail's existing distribution system which it refused to sell to the town, the new distribution system would either have to be put underground or built higher than Otter Tail's existing system in order to meet the clearance requirements of the Electrical Safety Code. [Nye Depo. GX 288, pp. 16-17, 21-22]. This would increase the cost of constructing the new system. On July 20, 1963 Colman filed a

lawsuit against Otter Tail seeking to enjoin Otter Tail from continuing with its pole replacement program in Colman. At the time of the court hearing, Otter Tail discontinued installation of the taller poles so no written injunction was granted. [GX 155; Nye Depo. GX 288, pp. 23-24].

125. On July 30, 1963, the City Council passed a resolution refusing to act on the initiative petition, and approved the new plans and specifications prepared by Buell & Winter Engineering Company. [GX 310, pp. 26-27].

126. On August 6, 1963, three of the citizens who signed the initiative petition filed an application in the local circuit court for a writ of mandamus against the City Council of Colman, seeking to compel the Council to schedule an election on an ordinance to repeal the approval of the municipal electric system. [GX 161]. Employees of Otter Tail suggested the initiative petition procedure to the citizens in Colman who signed it. Otter Tail drafted the initiative petition and the subsequent action for a writ of mandamus. Otter Tail's attorneys actively participated in the legal proceedings involved including the subsequent appeal to the Supreme Court of South Dakota, and Otter Tail absorbed all the legal expenses incurred in the proceedings. [GX 161-162; Brewer Depo. GX 291, pp. 15-16].

126. On August 13, 1963, Colman's bond counsel advised the city attorney that even though the mandamus proceeding was not, in his opinion, meritorious, the litigation made it impossible for the city to deliver the no-litigation certificate which was required before the bonds could be sold. [GX 367].

127. On September 3, 1963, three companies submitted bids to construct the municipal electric system, but the pending mandamus proceeding prevented the city from awarding

the construction contract and selling the electric revenue bonds. [GX 310, pp. 29-31].

128. On September 9, 1963, the circuit court denied the application for a writ of mandamus, holding that the power to initiate an ordinance rescinding a previous bond election was created by legislation passed subsequently to the election wherein Ordinance #48 was approved and, since the general rule is that legislation operates only prospectively, the City Council of Colman had no power to submit the proposed ordinance to a vote of the electors. [GX 162-63].

129. On September 14, 1963, Colman's city attorney notified Colman's bond counsel that the writ of mandamus had been denied and that two of the three petitioners had asked to be withdrawn from the mandamus proceeding. He noted that there was a four month period within which to appeal the trial court's decision and asked whether the revenue bonds could be sold during this period. Bond counsel advised him that the bonds could not be sold until the litigation had finally ended. [GX 368, 369].

130. On November 13, 1963, petitioners filed an appeal to the South Dakota Supreme Court in the mandamus proceeding. [GX 164].

131. On September 8, 1964, the Supreme Court of South Dakota unanimously affirmed the circuit court and denied the writ of mandamus. The Court ruled that the election wherein the Colman electors "emphatically and irrevocably" approved Ordinance #48 was "valid and non-rescindable", since it occurred more than six months prior to the passage of the legislation enabling, under certain instances, municipalities to rescind previous bond elections. [GX 165—Decision reported in 130 NW 2d 109 (S.D. 1964)]. The initiative petition and the subsequent mandamus proceeding delayed establishment

of the municipal electric system in Colman for over a year.

132. On September 14, 1964, Otter Tail's Division Manager-East proposed to the City Council that, in exchange for a new franchise to distribute electric power to Colman, Otter Tail would absorb all the costs which the city had incurred in connection with the proposed municipal system, including engineering, legal and advertising expenses, would establish a three man area line crew in Colman, would build a new garage in Colman, and would rebuild and modernize the Otter Tail distribution system in Colman. [GX 171; GX 179-G]. In October, 1964, the Council rejected the proposal. [GX 310, p. 34].

133. On September 21, 1964 a petition for rehearing was filed with the South Dakota Supreme Court in the mandamus proceeding, but it was denied by the Court on October 9, 1964. [GX 166-167].

134. On September 21, 1964 the City Council passed a resolution accepting the bid of Gefke & Co. to purchase the $95,000 of electric revenue bonds and passed a resolution approving the plans and specifications for construction of the municipal electric system and set October 22, 1964 as the date for receipt of construction bids. [GX 310, pp. 32-33].

135. On October 22, 1964 the City Council received bids from three companies to construct the municipal electric system and accepted the low bid of E. A. Pedersen Company. [GX 310, pp. 35-36].

136. On or about June of 1965 the construction of the municipal electric system had been completed and was in operation. Otter Tail dismantled and removed its retail distribution system in Colman. [GX 84, p. 15, Stipulation #45].

137. The Colman municipal electric system receives power at wholesale from the Bureau of Reclamation and the power is wheeled to the town by East River Electric Cooperative and

Sioux Valley Empire Electric Association. [GX 84, p. 15—Stipulation #44].

D. *Aurora, South Dakota*

138. Otter Tail obtained a renewal of its franchise to supply electric power at retail in Aurora, South Dakota on November 28, 1951 for a 10 year term. [GX 180; GX 2, Schedule A, p. 2]. Aurora did not renew Otter Tail's franchise when it expired on November 28, 1961. [GX 2, Schedule A, p. 2].

139. On March 26, 1963 Aurora retained the consulting engineering firm of Smith & Sheen in Watertown, South Dakota to conduct a study of the feasibility of a municipal electric system in Aurora. [GX 139, p. 1].

140. On April 18, 1963, Mr. P. N. LaTourette, the local District Manager of Otter Tail, informed Smith & Sheen that Otter Tail would not sell its distribution system to Aurora, would not sell power at wholesale and would not wheel Bureau power to the town. [GX 182].

141. On August 12, 1963 the Town Board adopted Ordinance #40 calling for the establishment of a municipal electric system and the issuance of revenue bonds to finance it and scheduled a special election on the Ordinance for September 10, 1963. [GX 318, pp. 21-24]. At the special election on September 10, 1963 the citizens of Aurora voted against the municipal electric system by a vote of 56 "Yes" and 57 "No." [GX 218, pp. 25-26; GX 2, p. 1].

142. Aurora applied for and received an allocation of power from the Bureau of Reclamation on July 8, 1964. [GX 214].

143. In April, 1965, Smith & Sheen submitted a revised feasibility report which concluded that a municipal electric system was feasible in Aurora. [GX 320].

144. On April 12, 1965, the Town Board of Aurora adopted Ordinance #44 for the establishment of a municipal electric system and the issuance of $40,000 of revenue bonds to finance it and scheduled a special election for May 18, 1965. [GX 318, pp. 32-35]. At the special election on May 18, 1965, the citizens of Aurora approved a municipal electric system by a vote of 86 to 36. [GX 318, pp. 36-37; GX 2, p. 1].

145. On June 4, 1965, the Town Board passed resolution #9 for sale of the $40,000 of revenue bonds to finance construction of the municipal electric system, and authorized the town Clerk to publish notices for bids on the sale of bonds to be received by the Board on June 28, 1965 and for bids for construction of the system to be received by the Board on July 6, 1965. [GX 318, pp. 38-45].

146. On June 25, 1965, Otter Tail and three Aurora residents jointly filed a complaint seeking to enjoin the Town Board from selling the bonds or proceeding with construction of the proposed municipal system. [GX 186]. The complaint alleged that the proceedings relating to construction of a municipal system and sale of revenue bonds were illegal for the following reasons: (1) there were material variances between Ordinance #44 approving construction of the municipal system and the resolution passed by the town board which described the terms for the sale of the revenue bonds; (2) the "Anti-Competition Clause" required to be contained in the revenue bonds could not be fully complied with because Aurora was required by contract to purchase its municipal electric services from Otter Tail until December 5, 1970; (3) the election approving Ordinance #44 was invalid in that the date of the election was not in accord with the State statutes and constitution; (4) sale of the revenue bonds would be illegal until it could be determined whether the municipal system

could be constructed within the authorized amount of the proposed revenue bonds; and (5) the specifications for construction of the municipal system were improper and illegal and did not furnish a proper legal basis for competitive bidding. [GX 186].

147. On June 28, 1965, the Town Board received one bid from the Brookings International Life and Casualty Company for $17,500 of the revenue bonds. The Board rejected this bid because it included only part of the proposed $40,000 issue. [GX 318, p. 46].

148. On July 6, 1965, the Board passed resolution #10 which rescinded resolution #9, resolution #11 which prescribed new terms and covenants for the sale of revenue bonds, resolution #12 which provided for the sale of $40,000 of revenue bonds and resolution #13 which authorized Aurora to bid on its own revenue bonds. [GX 318, pp. 47-49].

149. On July 6, 1965, the Board opened the two bids received for construction of the municipal electric system: Stake Construction Co. in Lennox, South Dakota for $41,001.65 and Lund Line Construction Co. in [illegible]by, South Dakota for $29,925.75. On August 2, 1965, the Town Board awarded the construction contract to Lund Line Construction Company. [GX 318, pp. 59-60, 62].

150. On August 2, 1965, the Town Board received two bids on the new resolution for sale of the $40,000 of revenue bonds: one from The Brookings International Life and Casualty Company for $20,000 and one from the Town of Aurora itself for the remaining $20,000 to be purchased from its own surplus funds. The Town Board accepted both bids and authorized the Town Clerk to have the revenue bonds printed and prepared for issuance. [GX 318, pp. 61-64].

151. On August 10, 1965, Otter Tail and three Aurora residents jointly filed an amended complaint seeking to enjoin sale of the bonds and commencement of construction. The complaint alleged additional grounds for invalidating the proceedings relating to construction of the municipal system and sale of revenue bonds, including allegations that (1) Resolution No. 13 authorizing the Town to bid on its own revenue bonds was invalid because it was *ultra vires* and contrary to the terms of Ordinance No. 44; (2) there were factual variances between Resolution No. 12 which provided for sale of $40,000 of revenue bonds and Resolution No. 11 which specified the terms of sale of the bonds; and (3) the Town Board was legally required to reject certain received bids relating to the construction of the system. [GX 188].

152. On August 19, 1965, Otter Tail was granted an interlocutory injunction, thereby halting proceedings to establish the municipal electric system. [GX 189 and GX 191].

153. On January 16, 1967, the trial court held that (1) Otter Tail had no standing to sue in the aforesaid proceeding, (2) that the election wherein Ordinance No. 44 was approved was valid and legal and (3) that the Town of Aurora could not buy its own revenue bonds. [GX 192 and GX 193].

154. On September 6, 1967, the Town Board retained Ehlers and Associates, a financial consultant firm, to assist in marketing the $40,000 of revenue bonds. [GX 318, p. 64]. On December 29, 1967 Ehlers informed Aurora that several factors, including the threat of another lawsuit by Otter Tail, prevented sale of the electric revenue bonds. [GX 325].

155. On January 29, 1968, Aurora accepted the bid of D & G Investment Company to purchase the $40,000 of revenue bonds. [GX 318, p. 71].

156. On February 5, 1968, the Town Board directed the town Clerk to publish a notice for construction bids to be received on March 4, 1968. [GX 318, p. 76].

157. On February 28, 1968, eight residents of Aurora filed with the Town Board an initiative petition asking for a referendum to repeal Ordinance #44 which authorized the issuance of revenue bonds and construction of the municipal electric system which had been previously approved by the voters on May 18, 1965. [GX 195].

158. On March 4, 1968 the Town Board rejected the initiative petition and accepted the bid of Lund Line Company to construct the municipal electric system. [GX 318, pp. 77-79].

159. On March 7, 1968 the signers of the initiative petition requested a writ of mandamus from the local circuit court to require the Town Board to show cause why they should not submit the referendum sought by the initiative petition to a vote of the citizens. On March 8, 1968, the Circuit Court issued a show cause order. [GX 196, GX 197].

160. Representatives of Otter Tail suggested the initiative petition procedure to the citizens in Aurora who signed it. Otter Tail attorneys drafted the initiative petition and the subsequent action for a writ of mandamus. Otter Tail's attorneys actively participated in the legal proceedings involved, and Otter Tail absorbed all the legal expenses incurred in the proceedings. [GX 196; GX 197; Brewer Depo. GX 291, pp. 5-8; Hartl Depo. GX 287, p. 167].

161. On March 25, 1968, the Town Board, after it was served with the writ of mandamus, scheduled a special election for April 16, 1968 on the referendum to repeal approval of the municipal electric system. [GX 318, p. 83]. At the election on April 16, 1968, the referendum to repeal approval of the mu-

nicipal electric system was defeated by a vote of 36 Yes and 105 No. [GX 318, pp. 84-85; GX 2, p. 1].

162. On April 19, 1968, the Town Board executed a construction contract with Lund Line Company which proceeded to build the municipal distribution system. [GX 318, pp. 84-85].

163. On or about June 1, 1967, George Danforth, bond counsel for the Town of Aurora, informed W. R. McCann, attorney for Aurora, that the revenue bonds could not be sold until all litigation and appeals were over because a no-litigation certificate was necessary in order to market the bonds. [GX 352].

164. The municipal electric system in Aurora began operation in July 1968. [GX 318, p. 87; GX 2, Schedule A, p. 4].

165. Aurora's municipal electric system purchases power at wholesale from the Bureau of Reclamation. The power is wheeled to the town by East River Electric Cooperative and Sioux Valley Empire Electric Association. [Waples II: pp. 79-81; GX 245; GX 246; GX 84, Stipulation 59].

166. The lawsuit brought by Otter Tail on June 25, 1965 and the subsequent initiative petition and mandamus proceeding sponsored and paid for by Otter Tail delayed establishment of the municipal electric system in Aurora for approximately three years. [GX 244, GX 323, GX 326, GX 328].

E. *Finley, North Dakota*

167. Otter Tail's franchise from the City of Finley expired in 1958 and was not renewed. [GX 84, Stipulation #62].

168. On April 4, 1960 the voters approved the construction of a new municipal electric system by a vote of 189 to 166. The ballot in this election, however, did not contain a submission of the question of issuing revenue bonds to finance construc-

tion of the proposed municipal system. [GX 84, Stipulation #69; GX 2, p. 2].

169. In June 1964 the City Council retained an engineer to prepare a feasibility study of a municipal electric system; and in September 1964 the engineer submitted a report to the City Council which concluded that a municipal electric system in Finley was economically feasible. [GX 84, Stipulation #65; GX 292-J; 292-K].

170. Finley is located in an area where electric suppliers other than Otter Tail could economically wheel power to a municipal system in the town. [GX 292-K; GX 206].

171. On November 17, 1964 the voters of Finley voted against the establishment of a municipal electric system, and Otter Tail continues to serve the town at retail. [GX 84, Stipulation #69; GX 2, p. 2].

172. Prior to the election on November 17, 1964 Otter Tail stationed a new three man area line crew in Finley to improve service in the town. [GX 378, p. 5; Nygard Depo. GX 289, pp. 25-26].

F. *Velva, North Dakota*

173. On March 8, 1967 Velva informed Otter Tail that the city would not renew Otter Tail's franchise when it expired on June 3, 1967. [GX 419].

174. In January 1968 an engineering report was submitted to the town which concluded that a municipal electric system would be economically feasible in Velva. [DX 88].

175. Velva is located in an area where electric suppliers other than Otter Tail could economically wheel power to a municipal electric system in the town. [DX 93].

176. A group of Velva citizens in favor of a municpal electric system petitioned the city council to submit the question of whether Otter Tail should be granted a new franchise

to a vote and the question was put on the ballot for the regular city election scheduled for April 2, 1968. [GX 184].

177. Prior to the election Otter Tail stationed a new area line crew in Velva to improve service in the town. [GX 421, p. 3], and agreed to enter into a new municipal service contract with Velva which reduced the number of hours during which Otter Tail charged the highest rate for municipal pumping and other incidental uses. [GX 423, par. 11].

178. At the election on April 2, 1968 the electorate voted to grant Otter Tail a new franchise by a vote of 346 to 215. [GX 184].

179. In August 1968, Otter Tail installed new mercury vapor lights in Velva for which Otter Tail charged the town a rate lower than Otter Tail's existing rate for a one year trial period. [GX 424].

G. *Municipal Power Elections in Other Towns Served at Retail by Otter Tail.*

180. From 1945 through 1970 there have been elections on the question of establishing a municipal electric system in 12 towns served at retail by Otter Tail, including Aurora, Colman, Elbow Lake, Hankinson, Finley and Velva. [GX 2, pp. 1-3].

181. The other six towns in which there were municipal power elections were Britton, South Dakota; Crookston, Minnesota; Milbank, South Dakota; Minneota, Minnesota; Walhalla, North Dakota; and Wheaton, Minnesota. There were a total of 11 elections on the municipal power issue in these six towns at various times, all prior to 1955, and Otter Tail won at least five of them. None of these towns established municipal electric systems. [GX 2, pp. 1-3].

H. *Towns Which Have Discontinued Receiving Electric Power at Retail from Otter Tail.*

182. Since 1945 nine towns have discontinued receiving electric power at retail from Otter Tail. [GX 2, p. 3]. Three towns—Georgetown, Minnesota, White Spur and Woodworth, North Dakota—were sold voluntarily by Otter Tail to rural electric cooperatives who were able to provide better service to the towns. [GX 84, Stipulations #84-106]. Three towns—Dakota City, Sanish and Van Hook, North Dakota—went out of existence. [GX 84, Stipulations # 73-76, 81-83]. Three towns—Colman, Aurora and Elbow Lake—established municipal electric systems. [GX 84, Stipulations # 1-14, 30-45, 46-60].

## IV. RELEVANT MARKET

A. *Product Market*

183. The relevant product market is the sale of electric power at retail.

B. *Geographic Market*

184. Otter Tail sells electric power at retail in 465 towns in its three-state service area. [DX 95, Schedule 1]. Otter Tail provides retail service in these 465 towns pursuant to non-exclusive franchises awarded by the towns to Otter Tail which grant Otter Tail the right to construct, install and maintain an electric distribution system in the towns for periods varying from 10 to 20 years. [Hartl Dep. GX 287, p. 19] Otter Tail also distributes electric power at retail to certain farms and other rural loads located outside the corporate limits of these 465 towns, but these rural customers comprise less than 10% of the total retail customers served by Otter Tail. [GX 2, p. 8]. The sale and distribution of electric power at retail in the 465 towns is Otter Tail's principal source of electric revenue. In 1970 Otter Tail received $31,065,517 from the distribution of electric power at retail in these towns and limited rural areas. This comprised approximately 91% of Otter

Tail's total electric revenues of $34,153,292. [DX 95, Schedules 1 and 5].

185. Each town served at retail by Otter Tail constitutes a separate relevant geographic market.

(a) Otter Tail distributes electric power at retail in each municipality pursuant to a franchise granted by the municipality for a limited period of time. Otter Tail operates and maintains a separate distribution system in each municipality in which it distributes electric power at retail. [GX 85, GX 115, GX 144, GX 180; Hartl Dep., GX 287, pp. 17-19].

(b) Otter Tail is generally the sole supplier of electricity at retail in municipalities it serves at retail, so it controls 100% of each such market.

i. Otter Tail was the sole supplier of electricity at retail in Elbow Lake, Minnesota, before the town established a municipal electric system. [Nye IX; p. 92].

ii. Otter Tail is the sole supplier of electricity in Hankinson, North Dakota. [Nye Tr. IX; p. 91].

iii. Except for a very few customers, Otter Tail was the only supplier of electricity at retail in Colman and Aurora, South Dakota. [Nye Tr. IX; pp. 102, 103].

186. Otter Tail supplies power at retail only in those areas of Minnesota, North Dakota and South Dakota where Otter Tail has transmission lines and distribution facilities. The Otter Tail service area corresponds generally with the outer limits of Federal Power Commission Supply Area No. 26. [DX 94; Nye Tr. IX-83]. Otter Tail does not serve customers at retail outside of Federal Power Commission Supply Area No. 26. [Nye Tr. IX-83].

187. Otter Tail distributes electric power at retail in approximately 75.6% of the towns located in its service area.

(a) Otter Tail distributes electric power at retail in 465 municipalities within its service area. [DX 95, Schedule 1].

(b) Municipal electric utilities sell electric power at retail in 45 towns located within Federal Power Commission Supply Area No. 26. [DX 94, Schedule B].

(c) Rural electric cooperatives sell electric power at retail in 105 municipalities within Federal Power Commission Supply Area No. 26. [DX 98].

188. Otter Tail distributes electric power at retail in approximately 91% of the towns located in its service area if the 105 towns served at retail by rural electric cooperatives are not included in the relevant market. Rural electric cooperatives do not compete with Otter Tail to serve at retail any towns in which Otter Tail is the existing retail supplier.

(a) The rural electric cooperatives do not attempt to obtain and do not compete for the retail distribution of power in towns served by Otter Tail. Since 1945 rural electric cooperatives have taken over retail distribution of electric power in only three towns formerly served at retail by Otter Tail. In each of these three towns—Woodworth, North Dakota; Georgetown, Minnesota and White Spur, North Dakota—Otter Tail voluntarily sold its distribution systems to the cooperatives because the towns were located in isolated portions of Otter Tail's service area and the cooperatives were in a position to provide more reliable service to the towns. [GX 84: Stipulations 84-106].

(b) The Rural Electrification Act does not permit the lending of funds so as to permit a cooperative to provide electric power to towns which are already receiving central station service. [7 U.S.C. §904]. The 465 towns in which Otter Tail sells power at retail and the 45 towns in the Otter Tail service area which receive power at retail from munic-

ipal electric utilities are all currently receiving central station service.

(c) The Rural Electrification Act does not permit the lending of funds so as to permit cooperatives to provide service to towns which have 1500 or more inhabitants. [7 U.S.C. §904; 913]. Otter Tail sells power at retail to 28 towns with 1500 or more inhabitants. [Ans., Part II, p. 2].

(d) Rural electric cooperatives did not compete with Otter Tail to sell power at retail in Hankinson, Elbow Lake, Colman and Aurora. The Sioux Valley Electric Cooperative agreed to wheel Bureau power to Colman and Aurora. [GX 84: Stipulations 44 and 59]. The REA administrator would not approve the sale of power at wholesale to Hankinson by RSR Electric Power Cooperative. [GX 330].

(e) The bulk of farms and other rural customers outside of the corporate limits of municipalities in Otter Tail's service area are supplied with retail power by rural electric cooperatives. Otter Tail does not compete to provide retail service to rural loads being served at retail by rural electric cooperatives. [Nye Tr. IX: pp. 88, 89].

189. The competition for the sale of electric power at retail in towns is generally for the entire retail load located within the corporate limits of the town, and such competition is generally between Otter Tail and a proposed or existing municipal electric utility.

(a) In a limited number of towns which Otter Tail serves at retail, including Hankinson, Elbow Lake, Colman and Aurora, a proposed municipal electric utility competed with Otter Tail for the sale of power at retail in the town. [GX 84: Stipulations 7, 8, 23, 40, 41, 55 and 56].

(b) In six towns which a municipal electric utility served at retail, including Fergus Falls, Minnesota, Otter Tail com-

peted with a municipal electric utility for the sale of power at retail in the town, and in all six towns Otter Tail succeeded in obtaining a franchise to serve the towns at retail. [Hartl Dep., GX 287, pp. 128-130; GX 2, p. 4].

190. The Bureau of Reclamation sells power to municipal electric systems only at wholesale, and does not sell power at retail in any town in the Otter Tail service area. [Muller Dep. GX 204A, pp. 23, 25].

191. The towns served at retail by Northern States Power Company (hereinafter NSP) in Federal Power Commission Supply Area No. 26 are not part of the relevant market.

(a) NSP is an investor owned utility which distributes electric power at retail in some municipalities located within Federal Power Commission Supply Area No. 26. [DX 94].

(b) NSP defines its service area to encompass only those areas where it has distribution facilities to supply retail customers. [Spethmann Tr. II; p. 5].

(c) NSP and Otter Tail do not attempt to obtain and do not compete for the retail distribution of electric power in municipalities served by the other. [Nye Tr. IX: pp. 85-87; Spethmann Tr. II: pp. 5-6].

192. Governmental installations located in Federal Power Commission Region No. 26 should not be included in the relevant market.

(a) There are 13 state and federal governmental installations in Federal Power Commission Region No. 26 which purchase power from the Bureau of Reclamation as preference customers. [DX 94, Sch. D].

(b) The electric power supply for each of the 13 installations is arranged pursuant to negotiations between the state or federal officials and power suppliers, and the utility which supplies electric power at retail to the adjacent town

must compete with other power suppliers for sales to the government installations. [Hartl Tr. VIII; p. 27].

(c) The Bureau has not competed with Otter Tail to provide retail electric service to towns. [Muller Dep., GX 204A, pp. 23-24]. In Hankinson, Elbow Lake, Aurora and Colman the Bureau offered to sell power only at wholesale to municipal electric systems as preference customers, and the municipal systems proposed to sell the power at retail in the towns.

193. The relevant market does not include rural loads served at retail in the Otter Tail service area.

(a) Rural loads encompass sales at retail to farms and other customers located outside corporate limits of towns. [7 U.S.C. 913].

(b) Otter Tail does not compete with rural electric distribution cooperatives to serve rural loads. [Nye Tr. IX: p. 89].

(c) The purpose of the Rural Electrification Act is to provide retail service to rural loads. [7 U.S.C. §902].

194. Otter Tail has constructed an extensive transmission network in its service area to deliver power to the 465 towns it serves at retail. [Ans., part I].

## V. DOMINANCE IN TRANSMISSION

195. There are three functionally distinct types of electric power lines.

(a) "Bulk power supply transmission" refers to electric power lines which are used to move large blocks of power from generating facilities to principal load centers. [Trommershausen—Tr. V: p. 41]. A bulk power supply transmission network cannot be used to deliver power directly to

the ultimate consumers. [Trommershausen—Tr. V: p. 41]. This type of electric power line generally has a voltage of 115 KV or greater. [Trommershausen—Tr. V: p. 39].

(b) "Subtransmission" consists of electric power lines whose function is to move power from the bulk power supply transmission network to the local retail distribution systems. [Trommershausen—Tr. V: pp. 40-43]. Subtransmission lines generally have voltages ranging from 69 KV to 34.5 KV. [Trommershausen—Tr. V: pp. 40-43]. The subtransmission lines interconnect with the bulk power supply transmission network at various substations where transformers step the power down from the high voltage level of the bulk power supply system to the lower subtransmission voltages. The subtransmission lines then move the power to other substations and transformers located near the ultimate retail load which step the power down to the voltage level of the distribution system. [Trommershausen—Tr. V: pp. 40-43].

(c) "Distribution" lines perform the function of moving the power from substation interconnections with the subtransmission network to the retail customers. Distribution lines generally have voltages of 12.5 KV or less. [Trommershausen—Tr. V: pp. 41-43].

196. Otter Tail owns and operates 5,992 miles of electric lines. 4,036 miles—about two thirds of the total—consists of 41.6 KV subtransmission line. Otter Tail operates only 737 miles of bulk power supply transmission line consisting of 115 KV and 230 KV line, which is about 12% of the total. The remaining lines consist primarily of low voltage distribution lines with some additional subtransmission line at voltages other than 41.6 KV. [GX 426, p. 22]. Otter Tail developed the

original, basic subtransmission system in its service area. Consequently, no other investor owned utility has constructed any subtransmission lines in Otter Tail's service area. [GX 206].

197. The Bureau of Reclamation basically has only a bulk power supply transmission system in the Otter Tail service area and throughout Region 6.[1]

(a) The Bureau currently has 7,037 miles of electric power lines in Region 6, of which 6,792.2 miles (97 percent) are bulk power supply transmission lines. [GX 286, p. 13].

(b) The Bureau utilizes the already existing subtransmission and bulk power supply transmission lines owned by utilities in Region 6 to move power from its high voltage transmission grid to its preference customers. [Muller Depos. GX 204A; p. 26; GX 204E, p. 38]. The Bureau adopted the policy of utilizing existing transmission facilities owned by others in lieu of constructing its own subtransmission network to deliver power to preference customers for three basic reasons: (1) because it avoids unnecessary duplication of facilities; (2) because it usually is not economically feasible for the Bureau or for a preference customer to build a separate subtransmission line to connect with the Bureau's high voltage transmission system; and, (3) because there is a Congressional mandate, contained in the so-called Keating Amendment which Congress attached to the annual appropriations bill for the Bureau, instructing the Bureau to use existing subtransmission facilities whenever possible. [Muller Depos. GX 204A, pp. 96-100; Muller Depos. GX 204D, pp. 19-20]. The Congressional policy re-

[1] The Bureau power marketing program in the 17 western states is subdivided into 7 regions. The Eastern Division of the Missouri River Basin Project, which encompasses the Otter Tail service area, is within Region 6. [Muller GX 204A, pp. 6, 10].

flected in the Keating Amendment makes it highly unlikely that the Bureau would obtain appropriations from Congress to build subtransmission to serve a preference customer. [Muller Depos. GX 204A, p. 100]. In the majority of cases, the most feasible method for the Bureau to deliver power to preference customers has been the use of existing subtransmission facilities of other power suppliers. [Muller Depos. GX 204A, pp. 99-100].

(c) The Bureau in Region 6 has negotiated and entered approximately 30 contracts with various power suppliers which give the Bureau the right to utilize the existing transmission and subtransmission systems owned by these suppliers to deliver power to its preference customers. [Muller Deps. GX 204A, pp. 96-97].

i. The Bureau has a transmission agreement of this type with Otter Tail. [GX 67]. The Bureau bulk power supply transmission system is interconnected with the Otter Tail subtransmission system at 14 substations. [GX 443]. Pursuant to this contract Otter Tail wheels power from the Bureau system to 17 municipal electric systems and 10 governmental installations. [GX 3-9, GX 11-20]. The Bureau pays a fee to Otter Tail for the use of its subtransmission system. [GX 67, pp. 28-29; Muller Dep. GX 204E, p. 79].

ii. The Bureau-Otter Tail Contract permits Otter Tail to use the Bureau's transmission system to deliver power to loads of Otter Tail. [GX 67, p. 35]. Otter Tail relies substantially upon the high voltage bulk power supply system of the Bureau for power delivery and reliability. [Hartl Tr. VII; pp. 12-13].

(d) The Bureau bulk power supply transmission network does not lessen Otter Tail's dominance in subtransmission in its service area.

i. The contract between Otter Tail and the Bureau contains a provision which Otter Tail interprets to mean that Otter Tail need not wheel Bureau power to any municipality in which Otter Tail sold power at retail as of June 14, 1955. [GX 67, para. 27(c)(2); GX 253]. Otter Tail invoked this provision as the basis for refusing to wheel Bureau power to Hankinson and Elbow Lake. [GX 253; GX 265].

ii. The Bureau has not constructed any subtransmission system in Otter Tail's service area. It has instead relied on its wheeling contract with Otter Tail to use Otter Tail's subtransmission system to deliver power to the Bureau's preference customers in Otter Tail's service area. [GX 206].

iii. The high voltage bulk power supply transmission system of the Bureau which traverses Otter Tail's service area generally cannot be used to serve Otter Tail's retail towns directly. [Trommershausen V: pp. 72-75]. In order to effect a direct delivery of power from the Bureau system to a municipal preference customer it is necessary to (a) install a transformer at the point of interconnection between the Bureau line and the subtransmission line to step the power down to subtransmission voltage; (b) construct a subtransmission line to deliver the power to the town; and (c) install a transformer to step the power down from subtransmission to distribution level voltage. This is too expensive to be economic for either the Bureau or the municipal customer. [Trommershausen Tr. V: pp. 72-75].

198. The portion of the Northern States Power Company Transmission system located adjacent to the Otter Tail service area does not lessen Otter Tail's transmission dominance.

199. The electric power lines owned by rural electric cooperatives in the Otter Tail service area do not significantly lessen the Otter Tail dominance in subtransmission.

(a) It is generally accepted that rural electric cooperatives are of two types: distribution cooperatives whose function is to sell power at retail to rural loads; and, generation and transmission cooperatives which are typically owned by a group of member distribution cooperatives and whose functions are to arrange the production and/or purchase of bulk power for its members and to provide transmission needed to deliver the power to the member distribution cooperatives.

(b) There are 38 distribution cooperatives which operate in portions of the Otter Tail service area. Collectively, the 38 distribution cooperatives own 84,707 miles of transmission lines in the Otter Tail service area. [DX 91]. These are generally low voltage distribution lines. [GX 205 and GX 206.—The map shows electric power lines in the bulk power supply and subtransmission categories.]

i. Whether a coop distribution line can be used to wheel power to a municipal electric system depends upon several factors: The size of the wire in the line; the size of the municipal load to be served; the distance over which the power is to be wheeled; and the distance separating the municipal load from the nearest substation transformer where the distribution line interconnects with higher voltage subtransmission lines. [Nye Tr. IX, p. 97].

ii. There are cooperative distribution lines in the vicinity of Hankinson. These lines are not capable of supplying power to the proposed municipal utility in the town and are not alternatives to the use of Otter Tail facilities for wheeling. [Nye Tr. IX, p. 98].

iii. There are cooperative distribution lines in the vicinity of Elbow Lake. These lines are not capable of supplying power to the municipal utility in the town and are not alternatives to the use of Otter Tail facilities for wheeling. [Nye Tr. IX: p. 98].

iv. A cooperative is able to wheel Bureau power over its distribution lines to the municipal utilities in Aurora and Colman due to proximity of the towns to substations connecting the coop distribution lines with subtransmission lines and due to the proximity of the coop distribution lines to the town.

v. In most portions of its service area the presence of low voltage distribution lines does not lessen the dependence of a proposed municipal system upon the Otter Tail subtransmission system for delivery of power. The two areas depicted by DX 92 and DX 93 encompass small areas as compared with the entire Otter Tail service area. [GX 206B; GX 205].

(c) There are 7 generation and transmission rural electric cooperatives (G&T coops) which operate in portions of the Otter Tail service area. The 7 G&T coops collectively own approximately 3000 miles of electric power lines. Minnkota Power Cooperative, Inc. owns 2017 miles of the total, and the other 6 G&T coops own a total of 883 miles. [DX 91]. The presence of the electric power lines owned by the 7 G&T coops in the Otter Tail service area does not significantly lessen Otter Tail's dominance in subtransmission.

i. Otter Tail has entered into transmission agreements with six of the G&T cooperatives which provide for various mutual services, including interconnections between the parties and the use by each party of the transmission facilities of the other to deliver power to customers beyond the reach of its own existing transmission lines. [GX 22, 40, 41-47, 48-55, 65].

(a) The Otter Tail transmission agreements with Cooperative Power Association, Lyon-Lincoln Electric Cooperative, Inc. and Traverse Electric Cooperative, Inc., RSR Electric Cooperative, Inc., and East River Electric Cooperative, Inc., contain provisions which prohibit the use of Otter Tail's transmission system by the cooperatives to supply power to a retail customer served by Otter Tail and extend the same prohibition with respect to customers served by the cooperative. [GX 22, 38, 39, 65; Hartl VII: 32-35]. Otter Tail's agreement with RSR Electric Cooperative, Inc., which contains a provision barring each party from using the facilities of the other to take away retail customers served by the other party, was entered into on January 18, 1968 subsequent to the municipal agitation in Hankinson, North Dakota where RSR attempted to deliver power to the proposed municipal electric system. [GX 38; Hartl Tr. VII; p. 121]. Otter Tail's transmission agreement with East River Electric Cooperative, Inc. was entered into on June 13, 1969 subsequent to the establishment of municipal electric systems in Colman and Aurora, South Dakota for whom East River and one of its member cooperatives wheel power from the Bureau of Reclamation. [GX 65]. The provision in the

agreement which bars each party from using the other's facilities to serve retail customers of the other is contained in a standard form contract Otter Tail recently developed for such contracts. [GX 65, Hartl Tr. VII: pp. 122-23].

(b) Otter Tail's transmission agreements with United Power Association, Central Power Electric Cooperative, Minnkota Power Cooperative and Runestone Electric Association do not contain any provision explicitly restricting service to existing customers of the other. [GX 40, 41-47, 48-55, 57; Hartl Tr. VIII: pp. 28-31]. It is not necessary for Otter Tail to have provisions restricting service to its existing customers in all transmission agreements with rural electric cooperatives. For example, Otter Tail does not need such a provision in its agreement with United Power Association, because Otter Tail agreed to deliver power for UPA to certain specified points only, none of which are near any town served at retail by Otter Tail. [Hartl Tr. VIII: pp. 78-79]. Delivery to any additional points requires the assent of Otter Tail. The approval of Otter Tail is necessary in the other contracts to enable the cooperative to use the integrated transmission facilities to serve municipal customers.

(c) The existence of the integrated transmission agreements between Otter Tail and rural electric cooperatives obviated the need for the cooperatives to build additional transmission.

200. It is not feasible to avoid dependence upon the Otter Tail subtransmission system by building a new line to connect a municipal utility with a wholesale power supplier.

(a) The construction and operation of an isolated and independent plant to generate electricity is not an economic or efficient method for obtaining power to supply a municipal electric system in the towns in the Otter Tail service area, most of which are relatively small. [Trommershausen V: 57-58, 64; Morton Tr. X; p. 70; Nye Depos. GX 288, p. 75].

(b) The construction of independent radial lines to connect with the facilities of other power suppliers is not an economical or reliable method of obtaining delivery of power for the vast majority of towns served at retail by Otter Tail. Radial lines provide less reliable service than so-called "loop service." Radial lines are connected with a power supply at only one end, whereas most towns served at retail by Otter Tail receive "loop service" from transmission lines which are connected with power supply at both ends. If the one power supply for a radial line fails there is a complete blackout, whereas loop service provides an alternative supply if such a failure occurs. [Trommershausen Tr. V: 70-71; Tr. VI: 85-86; Nye Tr. IX: 80-81].[2]

(c) The majority of towns served at retail by Otter Tail could not afford to build a radial line to connect with another power supplier.

i. The total cost for a mile of 41.6 KV transmission line today would exceed $10,000 to which the costs of substations and other connection facilities must be added. [Trommershausen Tr. V: p. 61].

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[2] Otter Tail sold its distribution system in the town of Georgetown, Minnesota to a rural electric cooperative because the town was located at the end of a long radial line which caused difficulty to Otter Tail in providing adequately reliable service to the town [GX 84: Stipulation 97-106].

ii. It would cost approximately $560,000 at current costs to build a 39 mile radial 41.6 transmission line from Hankinson, North Dakota to the nearest Bureau substation at Forman, North Dakota, including appropriate connection facilities. [Trommershausen Tr. V: pp. 60-62]. The Bureau found that it would not be economically feasible for it to construct such a line to serve Hankinson. [GX 256]. It would cost approximately $446,000 at current cost to build a 29 mile radial 41.6 KV transmission line from Elbow Lake, Minnesota to the nearest Bureau substation at Morris, Minnesota, including appropriate connection facilities. [Trommershausen Tr. V: p. 70]. It is economically infeasible for towns the size of Hankinson and Elbow Lake to construct such lines. [Trommershausen Tr. V: pp. 60-62, 70].

(d) The construction of radial lines to serve single towns is also undesirable because such lines often needlessly duplicate existing transmission lines which have capacity to serve the towns and have a detrimental impact upon the environment. Construction of radial lines to serve Elbow Lake and Hankinson would have wastefully duplicated existing Otter Tail transmission lines. [Trommershausen Tr. V: pp. 60, 70; Tr. VI: p. 86; GX 206].

201. Otter Tail used its dominance in subtransmission to prevent municipal electric systems in Elbow Lake and Hankinson from obtaining power from wholesale suppliers.

## VI. THE USE OF LITIGATION TO PRESERVE AND MAINTAIN A MONOPOLY

202. The sale of electric revenue bonds by municipalities to finance the establishment of municipal electric systems is impossible if there is any litigation pending or impending which concerns the municipal power project.

(a) The bonds customarily used to finance the establishment of municipal electric systems in North and South Dakota and Minnesota are electric revenue bonds. Holders of electric revenue bonds are repaid only from revenues produced by the operation of the municipal electric system. [Holton Tr. III: p. 3; GX 357].

(b) A municipality which desires to sell electric revenue bonds customarily retains an attorney knowledgeable in the sale of bonds whose function is to satisfy himself that the proposed municipal electric system is a feasible venture and that the bonds are marketable. [Holton Tr. III: pp. 4, 5]. In performing this function the bond counsel must determine: that there exists statutory authority for the issuance of the bonds [Holton Tr. III: p. 4]; that the proposed municipal electric system will yield sufficient revenue to repay the bondholders. [Holton Tr. III: pp. 4-5 and GX 357]; that an adequate supply of electric power will be available to permit the operation of the municipal electric system [Holton Vol. III: pp. 5-6 and GX 358]; that there exists an assured means of delivering the power to the municipal electric system [Holton Tr. III: pp. 5-6; GX 349, GX 357, GX 358]; and, that no litigation is pending or is threatened concerning any aspect of the proposed municipal electric system. [Holton Tr. III: pp. 6-7; GX 325, GX 357, GX 367 and GX 369]. The bond counsel concludes his work by pre-

paring an opinion reflecting his evaluation as to the viability of the municipal electric system and the marketability of the bonds. The town must execute a "certificate of no-litigation" which states that there is no pending or impending litigation concerning any aspect of the proposed municipal electric system. [Holton Tr. III: p. 6; GX 365]. The town must deliver the certificate of no-litigation to the bond counsel in order to enable the bond counsel to submit his opinion to the bond buyers on the date on which the bonds are to be sold. It is the universal custom in the bond business to require the delivery of the opinion of the bond counsel before the sale of the bonds. [GX 367]. There can be no sale of the bonds unless the bond counsel submits his opinion approving the sale, and the bond counsel cannot submit the opinion unless and until he receives a certificate of no-litigation from the town. [GX 369].

203. The litigation which Otter Tail directly or indirectly initiated in Aurora, Elbow Lake, Colman and Hankinson prevented each town from delivering the requisite certificate of no-litigation to bond counsel which in turn prevented the towns from proceeding with the sale of the bonds until the litigation was resolved. No progress toward the establishment of the municipal electric systems in the four towns was possible until the litigation ended and the bonds could be sold.

## VII. DISCRIMINATORY NATURE OF THE OTTER TAIL REFUSAL TO DEAL POLICY

### A. *Refusals to Wheel*

204. Wheeling is a practical and economic method by which to transmit electric power.

(a) Wheeling is an operation in which one utility uses the transmission facilities of another utility to move electric power from one location to another. [Trommershausen Tr. V: p. 46].

(b) There are two ways in which wheeling can be accomplished. The first method involves one utility placing a block of power into the transmission system of a second utility with that block of power physically transmitted to a point of redelivery into the system of the first utility or to a customer of the first utility. The second method is by displacement, which involves the delivery of a block of power by one utility into the transmission system of a second utility. The second utility uses the block of power to serve the load on part of its system and delivers an equivalent amount of power back at another point of the system of the first utility or to a customer of the first utility. [Trommershausen Tr. V: pp. 46-49].

(c) Wheeling is practical from both an engineering and an economic standpoint.

i. The practice among electric utilities is to construct transmission so that the utility will have excess capacity needed to meet anticipated future load growth. It is currently deemed advisable for a utility to plan its transmission system so that the system will have sufficient excess capacity to meet the load growth projected for the utility 10 years hence. The transmission system of a utility therefore always has a margin of unused excess capacity. Accordingly, utilities frequently decide to utilize this excess capacity by wheeling power for others, thereby earning a rate of return on what would otherwise be idle capacity and making full use of existing facilities. [Trommershausen Tr. V: pp. 50-52].

ii. Wheeling eliminates the need to build duplicate transmission lines, thereby reducing total construction expenses for utilities as well as lessening the impact of electric systems upon the environment. [Trommershausen Tr. V: pp. 49-51].

iii. Wheeling also serves to provide more reliable service by utilizing completed transmission loops, which prevents outages of entire areas, whereas the construction of duplicate radial transmission lines would subject the customers to the risk of complete outages. [Trommershausen Tr. V: pp. 49-51].

205. Otter Tail wheels power for investor owned utilities, rural electric cooperatives, state and government institutions and municipal electric systems to customers which Otter Tail does not serve at retail.

(a) Otter Tail wheels power produced by the Bureau of Reclamation from the Bureau transmission grid to various preference customers of the Bureau pursuant to its transmission agreement with the Bureau. [GX 67; GX 3-9; GX 11-20].

i. Otter Tail presently wheels Bureau power to 17 municipally owned electric systems in its service area. Ten of these customers purchase their total power supply at wholesale from the Bureau. The remaining seven have some generation of their own and purchase only part of their power supply at wholesale from the Bureau. [GX 3-9; GX 11-20] Otter Tail has negotiated a contract with each of these municipal wheeling customers which sets forth the terms and conditions for Otter Tail's wheeling service. [GX 3-9; GX 11-20] Otter Tail also wheels power from the Bureau to 10 governmental institutions in its service area. [Nye Tr. IX: pp. 90-91; DX 94, Sch. D]

ii. Otter Tail receives compensation for wheeling power from the Bureau of Reclamation to the 17 municipal electric systems. [GX 3-20; Trommershausen Tr. V: p. 83; Tr. VI, p. 43; Muller Dep., GX 204E: p. 79]

iii. The Bureau-Otter Tail wheeling contract and the special municipal service agreements which Otter Tail has entered into with each of its 17 municipal wheeling customers provide that Otter Tail will wheel power only to the extent that Otter Tail has excess capacity in its transmission lines. [GX 3-20, GX 67] The Bureau annually furnishes Otter Tail with projected four year load forecasts for the preference customers to which Otter Tail wheels Bureau power. Otter Tail then notifies the Bureau whether it has surplus capacity in its transmission lines to wheel all the power during the four year period. [Trommershausen Tr. V: pp. 51-52] The four year surplus capacity notice system has been used for the past 20 years and has worked well. There have been no instances in the Bureau Region 6 where excess capacity has not been found to wheel power to the Bureau's preference customers. [Trommershausen Tr. V: pp. 51-52; Tr. VI: pp. 94-95]

(b) In the late 1960's Otter Tail agreed to wheel power from the Bureau to the State School for the Deaf in Devils Lake, North Dakota. [Hartl Tr. VIII: pp. 24-28] The School was formerly served at retail by Otter Tail. [Hartl Tr. VIII: p. 26] The load represented by the School is greater than the loads of many of the towns presently served at retail by Otter Tail. [Hartl Tr. VIII: pp. 27-28] Otter Tail wheels Bureau power to nine other governmental installations which are former or were prospective retail customers of Otter Tail. [Nye Tr. IX: p. 91; DX 94, Sch. D]

(c) Pursuant to transmission agreements with rural electric cooperatives Otter Tail wheels power to various customers and facilities of these cooperatives. [GX 22; GX 38-59; GX 65] Otter Tail recently agreed to wheel power supplied by Basin Electric Power Cooperative to Lyon-Lincoln and Traverse Electric Cooperatives. [GX 89; Hartl Tr. VIII: pp. 23-24]

(d) On an engineering basis, there is no reason why Otter Tail could not wheel power from another supplier to a town which it presently serves at retail. The amount of power required by the town is the same whether it is sold to the town on a retail basis by Otter Tail or is wheeled to the town by Otter Tail from another supplier. [Trommershausen Tr. VI: p. 83] The same transmission facilities would be used to wheel the power as are used by Otter Tail to deliver the power at retail, so there is no doubt that Otter Tail would have capacity in its lines to wheel power to the town. [Trommershausen Tr. V: pp. 83-84]

B. *Refusals to Sell Power at Wholesale*

206. A wholesale is the sale of power for resale by the purchaser to someone else. [Trommershausen Tr. V: p. 76] Many investor owned utilities sell power at wholesale to municipal electric systems. [GX 425] Such sales are commonly either total requirements sales, where the municipal electric system purchases its total power needs from the seller, or partial requirements sales, where the municipal electric system itself produces part of the power it needs and purchases the balance from a wholesale supplier. [GX 425; Trommershausen Tr. V: pp. 76, 77] [3]

[3] Colman and Aurora each purchase their full requirements from the Bureau at wholesale. Elbow Lake seeks to become a partial requirements customer. See Part III, Sections A, C and D of the proposed findings for the details.

207. Otter Tail sells power at wholesale to investor owned utilities and has offered to sell power at wholesale to municipal electric systems to which it wheels power.

(a) Otter Tail sells power for resale to fellow members of the Upper Mississippi Valley Power Pool. In 1970 Otter Tail sold 215,308,000 kilowatt hours of electric energy to members of the pool for resale to their customers and Otter Tail derived a revenue of $1,550,200 from such sales. These sales are classified by the Federal Power Commission as "Sales for Resale" and are wholesale sales. [GX 441, pp. 409, 413; Trommershausen Tr. V: p. 84] Otter Tail has sold power at wholesale to members of the Upper Mississippi Valley Power Pool for resale to utilities which are not members of the pool. [GX 56]

(b) Otter Tail will sell power at wholesale to municipal electric systems to which it also wheels power from the Bureau of Reclamation. In each special municipal contract which Otter Tail has entered into with the 17 municipal electric systems to which it wheels power from the Bureau there is a provision for "Firm Electric Service."[4] This provision provides that the municipality must purchase from Otter Tail all power required by the municipality in addition to the power supplied by the Bureau. [GX 3-20]

(c) Otter Tail has an agreement with the City of Willmar, Minnesota which provides for an emergency interconnection between Otter Tail's system and the municipal electric system of Willmar. [GX 21] Under this agreement Otter Tail will supply power at wholesale to Willmar during emergencies. [GX 21; Hartl Tr. VII: p. 24] Willmar operates a municipal electric system and receives power from

[4] Firm electric service, as used in these provisions, is power sold by Otter Tail at wholesale to the municipal system for resale. [Trommershausen Tr. V: 78-82]

the Bureau which is wheeled to the town by Rural Cooperative Power Association. [Hartl Tr. VII: p. 24] Otter Tail is willing to supply emergency power at wholesale to Willmar because it was not a former retail customer of Otter Tail. [Hartl Tr. VII; pp. 116-118] Otter Tail refused to make the same type of emergency interconnection with the municipal system established in Elbow Lake, Minnesota because Elbow Lake was formerly a retail customer of Otter Tail. [Hartl Tr. VII: pp. 116-118]

(d) Otter Tail has entered into contracts with six rural electric cooperatives pursuant to which Otter Tail agrees to provide standby and emergency power at wholesale to the cooperatives. [GX 77-82]

(e) From an engineering standpoint, there is no reason why Otter Tail could not sell power at wholesale to a town which it presently serves at retail. The amount of power required by the town is the same whether it is sold to the town on a retail or wholesale basis. [Trommershausen Tr. VI: p. 83] The changeover would merely involve a bookkeeping change by Otter Tail. The same generation and transmission facilities would be used to generate and deliver the identical amount of power at wholesale to the municipal electric system as are used to deliver power at retail to the town. [Trommershausen Tr. VI: pp. 83-84]

(f) No other investor owned electric utility in Minnesota, or North Dakota and South Dakota has a policy similar to Otter Tail's regarding wholesale sales. [Hartl Dep., GX 287, p. 176]

(g) Otter Tail is the only investor owned electric utility in the United States which has filed a statement with the Federal Power Commission to the effect that it does not

hold itself out generally to sell power at wholesale. [Hartl Dep., GX 287; p. 174-176; Hartl. Tr. VIII: pp. 93, 94]

208. Otter Tail previously sold power to municipal electric systems and rural electric cooperatives at wholesale.

(a) Otter Tail filed its policy statement regarding wholesale sales with the FPC in 1947. [Hartl Tr. VIII: p. 93; GX 83] In 1949 Otter Tail supplied power at wholesale to 22 rural electric cooperatives, 16 municipalities and one other wholesale customer on either a full or partial requirements basis. [DX 89]

(b) In 1949 Otter Tail applied to Federal Power Commission for approval to raise its wholesale rates by 30 percent. [DX 89; Hartl Tr. VIII: p. 3] The rural electric cooperatives resisted the wholesale rate increase by Otter Tail. [Hartl Tr. VIII: p. 3] The Federal Power Commission conducted a hearing concerning the proposed increased wholesale rates because the rates were higher for rural electric cooperatives than for other wholesale customers and because many cooperatives protested the higher rate. [DX 89] The Commission eventually approved the increased wholesale rates. [Hartl Tr. IX: p. 6]

(c) During the early 1950's Otter Tail was having difficulty in supplying power to meet the growing loads of the rural electric cooperatives it served at wholesale, and Otter Tail informed them that it could not meet their total power needs. [Hartl Tr. VIII: pp. 3-4; GX 444, pp. 2130-2131] During that period Northern States Power Company's (NSP) wholesale rate for service to rural electric cooperatives was lower than the Otter Tail rate and NSP had excess power. [Hartl Tr. VIII: p. 4] Otter Tail transferred some of its wholesale rural electric cooperative customers to

Northern States Power Company in the early 1950's. [Hartl Tr. VIII: pp. 4-5; Hartl Tr. IX: p. 7]

(d) The 22 rural electric cooperatives formerly served at wholesale by Otter Tail ultimately became customers of the Bureau of Reclamation or members of Generation and Transmission Cooperatives. [Hartl Tr. VIII: p. 5; IX: p. 7] Thirteen of Otter Tail's 16 wholesale municipal customers ultimately became wholesale customers of the Bureau of Reclamation; two of them became retail customers of Otter Tail and one became a customer of a rural electric cooperative. [Hartl Tr. IX: pp. 8-9]

## VIII. LACK OF JUSTIFICATION FOR THE REFUSAL TO DEAL POLICY

A. *No Threat of Substantial Erosion of the Otter Tail System*

209. The Bureau of Reclamation is and will continue to be unable to sell much, if any, power at wholesale to new municipal electric systems in towns presently served at retail by Otter Tail.

(a) The Bureau of Reclamation is an agency of the U.S. Department of Interior, the primary functions of which are the reclamation of land, flood control, and irrigation supply achieved through the construction of dams, reservoirs and water conveyance systems. [Muller Dep. GX 204A: p. 5] The major ancillary functions of the Bureau are the development of hydroelectric power at dams constructed primarily for reclamation, navigation and irrigation purposes; the supply of water to municipalities and industry; and the development of water recreational facilities. [Muller Dep. GX 204A: p. 5]

(b) The Missouri River Basin Project administered by the Bureau of Reclamation is the source of Bureau power for preference customers in the Otter Tail service area. Congress authorized the Project for the purpose of constructing dams on the Missouri River and its tributaries in order to prevent floods, irrigate land and improve navigation on the Missouri River. [Muller Dep. GX 204A: p. 8]

i. The first dam in the Missouri River Basin Project was authorized in 1938 and the rest of the project was authorized principally by the Flood Control Act of 1944. [Muller Dep. GX 204A: pp. 8, 9] The U.S. Army Corps of Engineers constructed the dams in the Project and the Bureau markets the hydroelectric power produced at these dams. [Muller Dep. GX 204A: pp. 7, 8]

ii. The Missouri River Basin Project is divided into two divisions, the Eastern Division and the Western Division, for purposes of marketing the hydroelectric power produced by the project. [Muller Dep. GX 204A: p. 10] The Eastern Division encompasses the States of North Dakota, South Dakota, eastern Nebraska, western Iowa and Minnesota, and Montana east of the Continental Divide. [GX 205; Muller Dep. GX 204A: pp. 6, 7, 10-13] Region 6 of the Bureau handles power marketing in the Eastern Division [Muller Dep. GX 204A: pp. 6 and 10] Virtually all of Otter Tail's service area is located within the boundaries of the Eastern Division of the Missouri River Basin Project. [GX 205]

iii. In Region 6 the Bureau markets power produced at six hydroelectric plants built by the Corps of Engineers which have a total installed capacity of 2,048,000 kilowatts. [GX 286, p. 10] In Region 6 the Bureau also markets power produced at two hydroelectric plants built and

operated by the Bureau itself, which plants have a total installed capacity of 300,000 kilowatts. [GX 286, p. 8]

(c) The Bureau markets power in accordance with various prescribed standards.

i. The Bureau sells power only at wholesale, with the minor exceptions of some sales to ultimate customers, i.e. sales to Federal and State institutions. [Muller Dep. GX 204A: p. 23] The Bureau sells power pursuant to contracts, under published rate schedules which cover the operation and maintenance expenses of the project facilities and recoup the cost of the facilities with interest over a 40 year period. [Muller Dep. GX 204A: p. 24] The Bureau is directed by statute to give preference in the sale of power to public bodies and agencies, including municipal electric systems, rural electric cooperatives and other nonprofit organizations. [Muller Dep. GX 204A: pp. 24, 25] Because the Bureau does not have enough power to meet the needs of all potential preference customers, the Bureau periodically allocates its power resources among the customers which apply to it for power supply. [Muller Dep. GX 204A: pp. 38-39] The Bureau markets all long term commitments of power within specified marketing areas, although some short term sales of power are sometimes made to utilities outside such areas. [Muller Dep. GX 204A: p. 25]

ii. The Bureau sells power at wholesale to all types of utilities which sell power at retail, including investor-owned utilities such as Otter Tail, rural electric cooperatives, State power districts and municipal electric systems. [Muller Dep. GX 204A: p. 27] The Bureau sells various types of power at wholesale, variously described as long term firm, additional firm, short term firm,

seasonal firm, firm peaking, supplemental, replacement, irrigation, emergency, maintenance, dump and interchange. [GX 311; p. 27; Muller Dep. GX 204A: pp. 27-31] Firm power means power which is furnished on a continuous basis for the term of the contract. [Muller Dep. GX 204A: p. 28] Long term power generally refers to power contracted to be delivered for 10 years or longer. [Muller Dep. GX 204A: p. 28]

(d) The Bureau in Region 6 allocated long term firm power to preference customers in 1954, 1959 and 1964. [Muller Dep. GX 204A: p. 31; Muller Dep. GX 204B: p. 37] These three allocations of long term firm power were made on the basis of the firm power available from the power plants existing at the time on the Missouri River. [Muller Dep. GX 204B: p. 38] There has been no allocation of power by the Bureau since the 1964 allocation. [Muller Dep. GX 204A: p. 35; GX 204A: pp. 47, 48]

(e) The requests for power received by the Bureau in 1964 exceeded the anticipated supply of power, which necessitated the use of the allotment procedure. [Muller Dep. GX 204A: pp. 38, 39]

i. The Bureau on July 8, 1964 allocated power to 238 preference customers. [GX 214; Muller Dep. GX 204A: p. 46] One hundred and eighty-five of the allottees subsequently entered into contracts with the Bureau for the supply of power. [Muller Dep. GX 204A: p. 46] The Bureau rescinded the allotments of 40 allottees, primarily because they decided not to use Bureau power or because there were difficulties in delivering the power to them. [Muller Dep. GX 204A: p. 47] Seven of the allotments were transferred to or consolidated with an allotment to another preference customer. [Muller Dep. GX 204B:

pp. 39, 40] Six of the allotments are still outstanding, including one to Elbow Lake, Minnesota. [Muller Dep. GX 204B: p. 40] These remaining six allotments are very small and combined do not exceed 2,000 kilowatts. [Muller Dep. GX 204 B: pp. 40, 41]

ii. Only eight towns served by Otter Tail at retail applied for allotments of power from the Bureau in 1964. [GX 214; Muller Dep. GX 204D: pp. 40-45] Colman and Aurora, South Dakota established municipal electric systems and are using their allotments. Elbow Lake, Minnesota, was not able to obtain delivery of Bureau power to the municipal system it established and its allotment is still outstanding. The allotments to the remaining five towns, including Hankinson and Finley, North Dakota, were withdrawn after the towns notified the Bureau that they no longer wanted the allocations. [Muller Dep. GX 204D, pp. 44-45]

iii. The total amount of power allocated in 1964 by the Bureau was 1,845,000 kilowatts, consisting of 1,229,000 kilowatts of Class I firm power available immediately and 616,000 kilowatts of Class II power to become available in the future. [GX 214; Muller Dep. GX 204A: p. 53] Class I power was designated as long term power. [Muller Dep. GX 204A: p. 53] Class II power was eventually designated as additional firm power. [Muller Dep. GX 204A: pp. 53, 54]

iv. Class II power is the supply of additional firm power which has been used by the Bureau to meet the load growth requirements of the preference customers which received an allocation of Class I power in 1964. [Muller Dep. GX 204A: p. 55] The Bureau has announced three extensions of the time limit for the availability of addi-

tional firm power to meet the load growth requirements of its existing preference customers. [Muller Dep. GX 204A: p. 55] These extensions mean that the Bureau guarantees to meet additional load growth of existing preference customers up to a specific date. As more capacity develops, the date is moved ahead. The first extension was to 1970, the second to 1973, and the current extension is to meet the existing commitments of existing preference customers to 1977. [GX 216, GX 217; Muller Dep. GX 204A: pp. 55, 57] The three extensions of power supply availability made by the Bureau since 1964 have applied only to existing preference customers who already have been allotted power by the Bureau. [Muller Dep. GX 204A: pp. 56-57]

(f) It is very unlikely that the Bureau will make another allocation of power in Region 6. There are no projected surpluses of power after 1977 and the Bureau has no new generating capacity scheduled to go into operation. [Muller Dep. GX 204A: p. 61] The Bureau's total capacity from its hydroelectric plants is committed to its existing preference customers, and the Bureau does not foresee any other bulk power supply resources in the near future. [Muller Dep. GX 204C: pp. 64-65]

(g) The Bureau presently does not have power available to supply any new municipal electric systems located in the Eastern Division of the Missouri River Basin Project.

i. The Bureau in Region 6, since the beginning of 1970, has formally notified at least six towns in writing that it has no long term firm power available for a new municipal electric system. [GX 218-230; 232-234; Muller Dep. GX 204C, p. 67; Muller Dep. GX 204C, pp. 69-70] The Bureau may have some short term firm power avail-

able, but this is not a satisfactory power supply for a new municipal electric system. [GX 219, 225, 228; Muller Dep. GX 204A, pp. 64 to 68; Muller Dep. GX 204C, pp. 28-32; 69-70] The Bureau has informed existing preference customers that its resources will be fully utilized after 1977 and they should seek alternative power suppliers after that date. [GX 231; Muller Dep. GX 204A, pp. 80-81; Muller Dep. GX 204E, pp. 69-70] The Bureau does not and has not saved any power resources for possible new preference customers. [Muller Dep. GX 204A, p. 74]

(h) It is very unlikely that the Bureau will have very much, if any, power available for new municipal electric systems in the near future. [Muller Dep. GX 204 A, pp. 84 to 86] It is not likely that Region 6 of the Bureau will obtain power from other regions of the Bureau. If any power were available it would be only on a temporary, short term basis. [Muller Dep. GX 204A, p. 85] The policy of the Bureau is against the purchase of power from other power suppliers for the purpose of increasing the Bureau's firm power supply. [Muller Dep. GX 204A, pp. 85, 86]

i. The Bureau's power resources available for marketing are presently fixed and there is no foreseeable accretion of resources. [Muller Dep. GX 204C, p. 20]

ii. The arrangements which the Bureau has with Basin Electric Power Cooperative to purchase surplus energy from Basin do not provide any additional power resources for the Bureau to meet the load growth of its existing preference customers beyond 1977. [Muller Dep. GX 204A: pp. 91-92; Muller Dep. GX 204B: pp. 53-55] The Bureau will not obtain any additional long term firm power to sell to preference customers when Basin's second generating unit goes into operation in 1975. [Muller Dep.

GX 204B: pp. 49-52] The Bureau has contracts to sell fixed amounts of power to rural electric cooperatives which are members of Basin and these contracts will continue in effect after Basin's second unit comes on line. [Muller Dep. GX 204B: pp. 49-51]

iii. The Bureau will not obtain any additional long term firm power to sell to preference customers when the 800 megawatt unit, jointly owned by Nebraska Public Power District and Iowa Power & Light Company, goes on line. [Muller Dep. GX 204E: pp. 61-63]

210. The Basin Electric Power Cooperative is not a substantial source of wholesale power for new municipal electric systems in the Otter Tail service area.

(a) Basin Electric Power Cooperative is a generation and transmission cooperative headquartered in Bismarck, North Dakota, which was incorporated in 1961 by a group of rural electric cooperatives to supply themselves with power in addition to the power they obtained from the Bureau of Reclamation. [Grahl Tr. IV: pp. 2-3] Basin supplies power to cooperatives located in eight states: Montana, North Dakota, South Dakota, Nebraska, Iowa, Minnesota, Wyoming and Colorado. [Grahl Tr. IV: p. 4]

(b) Basin presently operates one generating unit with a nameplate capacity of approximately 216,000 kilowatts, which began commercial operation in January 1966, and Basin plans to construct a second generating unit with a nameplate capacity of 460,000 kilowatts to go into commercial operation in the fall of 1975. [Grahl Tr. IV: pp. 4-5]

(c) Basin has three types of members. Class A members are generation and transmission cooperatives which have executed contracts or intend to execute such contracts for the purchase of long term firm power from Basin over a

35 year period. Class B membership is available to any entity, including a municipal electric system, which wishes to buy short term power from Basin. Class C members are distribution rural cooperatives which are members of the Class A Generation & Transmission Cooperatives. [Grahl Tr. IV: pp. 7-8]

(d) All long term firm power from Basin's first and second generating units have been allocated by contract to Class A members [Grahl Tr. IV: p. 8] During the winter of 1970-'71 Basin sold 165,000 kilowatts out of the 170,000 kilowatt delivery capacity of its generating unit to Class A members. [Grahl Tr. IV: pp. 19-20]

(e) Basin can sell only surplus short term firm power to Class B members such as municipal electric systems. [Grahl Tr. IV: pp. 8-9] Basin has never sold any power and presently does not sell power to a Class B municipal electric system. [Grahl Tr. IV: p. 9] Basin does not promote the establishment of municipal electric systems. [Grahl Tr. IV: p. 9] If a town which wants to establish a municipal electric system asks Basin to supply the municipal system with wholesale power, it is Basin's policy to tell the town first to attempt to buy power from the town's present supplier. If that is not possible, then Basin directs the town to request power from the Bureau. If neither the present supplier nor the Bureau can or will sell power at wholesale to the town, then Basin offers to supply short term power to the town if Basin has any surplus available. [Grahl IV: 9-10; GX 306]

(f) The contractual relationships between Basin and the Bureau increase the power marketing capacity of each only to a very limited extent. Basin and the Bureau entered into a contract in 1962, and have agreed to subsequent sup-

plements thereto, concerning the use of a joint transmission system and other mutual services. [GX 235]

i. Basin Electric has very little transmission line. It owns about 12 miles of 230 kv line which interconnects Basin's generating unit to the Bureau transmission grid and about 12 miles of 115 kv line which supplies start up power to its generating unit. [Grahl Tr. IV: p. 5] The Basin-Bureau contract provides the means by which Basin delivers power to its customers over the Bureau transmission grid, for which service Basin pays the Bureau approximately $1 million a year. [Grahl Tr. IV: pp. 5-6]

ii. Pursuant to the Basin-Bureau contract, the Bureau furnishes backup power to Basin when its generating unit is shut down for maintenance or during an emergency. In exchange, Basin gives the Bureau first refusal rights on low cost winter electric energy available from Basin's generating unit. [Grahl Tr. IV: p. 11; Muller Dep. GX 204A: pp. 89, 90]

iii. Basin and the Bureau also have short term agreements, terminable on one year's notice, which provide that Basin will sell its surplus power and energy to the Bureau which in turn markets the power. [Grahl Tr. IV: pp. 11-12, 20-23; Muller Dep. GX 204A: pp. 89, 90] The Bureau sells most of the surplus power it obtains from Basin to investor owned utilities, including Otter Tail, and to a lesser extent to rural electric cooperatives. [Grahl Tr. IV: p. 2] The Bureau has not sold any of its Basin surplus power to municipal electric systems. [Grahl Tr. IV: pp. 21-22] The power which Basin sells to the Bureau pursuant to this arrangement is short term

surplus power and does not increase the amount of long term firm power the Bureau can market to preference customers. [Muller Dep. GX 204E: pp. 18-19] The amount of surplus energy that Basin has available for sale to the Bureau declines as the loads of its members increase. [Muller Dep. GX 204E: pp. 18-19, 24]

iv. The Bureau-Basin contract also provides that the Bureau will provide peaking power to Basin over three time periods so that Basin can supply the loads of its members to the extent that they exceed Basin's own generation capacity. [Muller Dep. GX 204E: pp. 15-17; Muller Dep. GX 204C: pp. 11-12]

211. The Missouri Basin Systems Group does not create an additional source of wholesale power for municipal electric systems. The Missouri Basin Systems Group (MBSG) was formed on January 31, 1963. [GX 235; Muller Dep. GX 204C: pp. 5, 6] Its membership consists of the Bureau of Reclamation, Basin Electric Power Cooperative, and various municipal electric systems, rural electric cooperatives and public power districts in eight states, most of which are preference customers of the Bureau. [GX 235; Grahl Tr. IV: pp. 23-24; Muller Dep. GX 204A: pp. 92-93; GX 204C: pp. 2-4] MBSG principally serves as a vehicle for joint planning of facilities among the members. It is dissimilar to power pools such as the Upper Mississippi Valley Power Pool in which the members frequently exchange power or share reserves. [Muller Dep. GX 204A: pp. 92-93; GX 204C: 4-7; Grahl Tr. IV: pp. 24-26, 63] Decisions of MBSG are not binding on its members, who can withdraw on one year's notice, and actual pooling of resources must be done pursuant to separate contracts between the members. [Muller Dep. GX 204C: pp. 4-7; Grahl Tr. IV: pp. 24-26, 63] Basin's second generating unit and an 800,000 kilo-

watt unit to be constructed in Nebraska, which will be jointly owned by Nebraska Public Power District and Iowa Power and Light Company, an investor owned utility, are the only two units which have resulted from joint planning by members of the Missouri Basin Systems Group. [Grahl Tr. IV: pp. 26-27, 63-64] The construction of some 345 kv transmission line has also been jointly planned. [Grahl Tr. IV: p. 27]

212. Neither the North Central Power Study nor the Corps of Engineers study of additional peaking capacity on the Missouri River is likely to yield much additional power for new municipal electric systems in Otter Tail Power's service area.

(a) The North Central Power Study was initiated by the Department of Interior in May 1970. The participants are approximately 36 public and private utilities, including the Bureau and Otter Tail, located in 13 states. The purpose of the study is to analyze the power supply resources and needs of the various utilities in the 13 state area between the years 1980 and 2000. [Grahl Tr. IV: p. 12, 13]

i. The study is currently in the preliminary planning stage. An important aspect of the study is the construction of large mine mouth generating plants in the coal fields in Montana, Wyoming and North Dakota. [Grahl Tr. IV: p. 12] The study is proceeding on the assumption that the participants will obtain up to one-third of their additional power requirements between 1980 and 2000 through joint efforts spawned by the study. This would amount to approximately 20,000 megawatts. [Grahl Tr. IV: p. 38] The role of the Bureau as envisaged by the North Central Power Study is to construct a limited amount of hydropeaking plants and build waterways and aquaducts to deliver water to the mine mouth thermal units to be built on the western coal fields. [DX 24] The

Bureau in Region 6 has no thermal generation units. [Muller Dep. GX 204E: p, 66] The study is proceeding on the assumption that the power resources available to the Bureau from the study will be fixed at a level necessary to meet the Bureau's 1977 load, so that the study cannot be used to expand the Bureau's marketable power supply beyond this level. [Hartl Tr. VIII: pp. 59-62]

ii. In the next phase of the study the various participants will study the preliminary plans and projections and decide whether to build their own plants or join with others in constructing mine mouth plants in the western coal fields. [Grahl Tr. IV: p. 42]

(b) The Corps of Engineers is studying the possibility of adding an additional 1,000,000 kilowatts of peaking capacity to the existing dams on the Missouri River. [DX 24, pp. 13-14; Muller Dep. GX 204C; pp. 50-51] This study is in the preliminary stages only. [DX 24, pp. 13-14; Muller Dep. GX 204C: p. 51] The addition of peaking capacity by the Corps of Engineers is not considered an economically feasible power resource by the participants in the North Central Power Study, because the estimated cost of $330/kw is too high. The cost must be reduced to approximately $200/kw before such capacity could be considered economical. [DX 24, pp. 13-14; Grahl Tr. IV: pp. 13-14; 64-65; Hartl Tr. VIII: pp. 61-63]

B. *The Continuous Growth of Otter Tail Offsets Its Prospective Loss of Some Retail Loads.*

213. Otter Tail has succeeded in persuading several towns to abandon a municipal electric system in favor of receiving retail service from Otter Tail.

(a) It is the corporate policy of Otter Tail to acquire municipal electric systems in its service area and thereafter

provide retail service to the towns whenever it is economical to do so. [Hartl Dep. GX 287; Hartl Tr. VIII: pp. 84-85]. Otter Tail initiates the discussions with municipal electric systems in attempts to acquire their facilities and to obtain franchises to serve the towns at retail and has made offers to acquire such systems. [Hartl Dep. GX 287: p. 124; Hartl Tr. VIII: pp. 84-85].

(b) Since 1947, Otter Tail has acquired six municipal electric systems in its service area and thereafter Otter Tail served the six towns at retail. [GX 2, Interrogatory 3].

i. Fergus Falls, Minnesota was one of the towns. [GX 2, Interrogatory 3]. In terms of revenue received, Fergus Falls is the largest town presently served at retail by Otter Tail. [DX 95, Schedule 5]. Prior to 1953 Otter Tail supplied power at wholesale to the municipal electric system in Fergus Falls. In 1953 the Bureau began to market power in the area. Otter Tail, which was and is headquartered in Fergus Falls, no longer wanted to have its headquarters in a town which it did not serve at retail. Accordingly, Otter Tail agreed to keep its general office and headquarters in Fergus Falls on condition that the City sell its municipal electric system to Otter Tail. The sale was completed on May 1, 1953. [Hartl Depo. GX 287: pp. 128-130].

214. The total Otter Tail existing electric load grows by approximately 7 percent per year through more intensive use of electric power by existing customers. [GX 445; Hartl Tr. VIII: pp. 80-84].

215. The Otter Tail load has also grown through the addition of new industrial and commercial customers. In 1972 Otter Tail will commence to supply power to a pipeline pumping station which is being constructed in its service area. The

addition of this load will increase Otter Tail's present total electric load by 25 percent. [GX 445; Hartl Tr. VIII: pp. 80-84].

216. Otter Tail will have an opportunity to sell additional amounts of power to the 17 municipal systems to which it presently wheels Bureau power because the Bureau is unlikely to be able to meet the load growth of these municipalities beyond 1977.

217. There will be no substantial impairment of Otter Tail's credit if the company is compelled to provide service to municipal electric systems.

(a) Otter Tail's present bond rating from Moody's is Baa. This has consistently been Otter Tail's rating since Moody's first began to rate Otter Tail's securities. [Hartl Tr. VIII: p. 84].

(b) If Otter Tail is compelled to sell power at wholesale or wheel power to municipal electric systems in towns it formerly served at retail, there will be little, if any, impairment of Otter Tail's credit. Otter Tail's bond rating would probably remain the same, because Moody's does not usually rate utility bonds below Baa. [Morton Tr. X: p. 73]. Otter Tail's bond rating was not affected when Otter Tail lost the retail service in the three towns of Elbow Lake, Minnesota, Colman and Aurora, South Dakota. [Morton Tr. X: p. 71]. The investment market judges and purchases the securities of a company on the basis of the company's past earning power and its future earnings prospects. [Morton Tr. X: pp. 44-45]. It is improbable that very many of the towns served at retail by Otter Tail will establish municipal electric systems. Otter Tail's over-all electric revenues are projected to grow substantially. [GX 445; Hartl Tr. VIII:

pp. 80-84]. Otter Tail has consistently earned a reasonable rate of profit. Its rate of profit compares favorably with that earned by other electric utilities in the United States. [DX 97; Morton Tr. X: pp. 59-60]. Many of the other utilities whose rate of profit is comparable with that of Otter Tail sell power at wholesale to municipal electric systems. [GX 425].

C. *There is No Engineering Reason Which Precludes Otter Tail from Wheeling or Selling Power at Wholesale to Municipal Electric Systems.*

218. Otter Tail never claimed engineering infeasibility as a reason for not wheeling or selling at wholesale to Hankinson and Elbow Lake.

219. There is no engineering reason why Otter Tail cannot wheel or sell at wholesale to a town which it serves at retail. The same amount of power is needed by the town irrespective of whether Otter Tail serves it at retail or at wholesale. The same transmission facilities are needed whether Otter Tail sells at retail, at wholesale, or wheels the power from an outside source of supply. [Nye Dep. GX 288, p. 79; Trommershausen Tr. VI, pp. 83, 84].

## IX. THE RESTRICTIVE PROVISIONS CONTAINED IN OTTER TAIL'S CONTRACTS WITH THE BUREAU OF RECLAMATION AND RURAL ELECTRIC COOPERATIVES ARE NOT IMMUNE FROM ANTITRUST ATTACK

A. *The Bureau of Reclamation*

220. The Bureau's general practice is to prepare drafts of transmission contracts with power suppliers which do not contain restrictions on the type or number of Bureau customers to be served over the transmission system of the other power supplier. [Muller Dep. GX 204A: pp. 102-103, 113].

This approach is based on the policy of the Bureau to make power available to as many preference customers as possible. [Muller Dep. GX 204A: p. 103]. The Bureau recently refused to enter into a wheeling contract with Minnesota Power & Light Company because the company insisted on a provision limiting the types of customers to be served. [Muller Dep. GX 204A: pp. 108-110].

221. The Bureau has agreed to enter into some transmission contracts which have contained restrictions on the type or number of Bureau customers to be served over the transmission system of the other supplier. These contracts have been the result of a bargaining process in which the power supplier insisted that such provisions be included in the contract. [Muller Dep. GX 204A: pp. 103-105]. The Bureau has accepted such restrictive provisions in some contract because the Bureau had no alternative but to give up prospective service to future preference customers in order to obtain a means of delivery of power to those existing preference customers the power supplier was willing to serve. [Muller 204A: pp. 103-105].

222. The restrictive provision in the Otter Tail contract with the Bureau was inserted at the behest of Otter Tail.

(a) Otter Tail and the Bureau commenced negotiations of a wheeling contract in 1948. [Hartl Tr. VIII: pp. 16-17]. The initial wheeling contract entered into by Otter Tail and the Bureau was dated March 14, 1950. [GX 66]. The 1950 Otter Tail-Bureau contract did not contain a restriction on the preference customers to which Otter Tail would wheel power from the Bureau. It specifically provided that the Bureau could transmit power over Otter Tail's transmission system to customers entitled to preference under governing law. [GX 66, Section 17c; Hartl Tr. VIII: pp. 6-7].

(b) Otter Tail and the Bureau amended the 1950 contract, effective on June 14, 1955, so as to substantially change the contract terms. The revised contract contains a provision which Otter Tail interprets to mean that it has no obligation to wheel power from the Bureau to any municipality which received retail service from Otter Tail as of the date of the contract, namely June 14, 1955. [GX 67, section 27c; Hartl Tr. VII: pp. 16, 17]. This provision was the subject of prolonged negotiations over several years between the Bureau and Otter Tail. [Hartl Tr. VII; pp. 16-18]. This provision affords Otter Tail a means of protecting its existing retail customers. [Hartl Tr. VIII: pp. 20-22]. There is no engineering justification for the provision.

i. Otter Tail insisted that such a provision be included in the contract. The Bureau finally acceded to the inclusion of the provision because it was the most practical arrangement the Bureau could make at the time to deliver power to the existing preference customers. [Muller Dep. GX 204A: pp. 114, 115; Hartl Tr. VIII: pp. 22, 23].

ii. The Bureau interprets this provision to mean that Otter Tail must evaluate each request by the Bureau for wheeling service in light of the facts and circumstances existing at the time the request is made. [GX 254; GX 264].

223. Otter Tail derives substantial benefits from its contractual relationship with the Bureau, including the use by Otter Tail of the Bureau's transmission system to transmit power to Otter Tail's customers, the purchase of economy energy and other types of low cost electric power and energy from the Bureau, and greater reliability of service through

the use of Bureau facilities in emergencies. [Hartl Tr. VII, pp. 12-13; Muller Dep. GX 204A, pp. 119-120].

B. *The Rural Electric Cooperatives*

224. The Otter Tail transmission agreements with several rural electric cooperatives contain provisions which prohibit the use of the Otter Tail transmission system by the cooperative to supply power to a customer served by Otter Tail and extend the same prohibition with respect to customers served by the cooperative. [GX 22; GX 38; GX 39; GX 65].

225. Otter Tail has transmission agreements with several rural electric cooperatives which contain no such restrictive provision. [GX 40; GX 41-47; GX 48-55; GX 57].

226. The Upper Mississippi Valley Power Pool has several rural electric cooperatives as members, provides for joint use of transmission facilities of the participants and contains no explicit restrictions prohibiting the use of the facilities to provide service by members to customers already served by another member. [GX 23-37].

PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

I. The Court has jurisdiction over the subject matter of, and the parties to, this action.

II. The relevant product market within the meaning of Section 2 of the Sherman Act in which to determine whether Otter Tail possesses monopoly power is the retail distribution of electric power.

III. The relevant geographic markets within the meaning of Section 2 of the Sherman Act in which to determine whether Otter Tail possesses monopoly power are:

A. The Otter Tail service area generally.

B. Each town served at retail by Otter Tail.

IV. Otter Tail has illegally attempted to monopolize and has monopolized the interstate trade and commerce in the

retail distribution of electric power in municipalities it serves at retail and in its service area generally in violation of Section 2 of the Sherman Act by engaging in actions which have the purpose and effect of delaying or preventing establishment of municipal electric power systems, including, but not limited to:

A. refusals to sell power at wholesale to proposed municipal electric power systems located in municipalities in which it distributes electric power at retail;

B. refusals to wheel power to proposed municipal electric power systems located in towns in which it distributes electric power at retail;

C. litigation against municipalities which have voted to establish municipal electric power systems; and

D. invocation by Otter Tail of provisions in contracts with the Bureau of Reclamation and various rural electric cooperatives which Otter Tail interprets to prohibit the use of its transmission lines to transmit power from other power suppliers to proposed municipal electric power systems in towns in which it distributes electric power at retail.

V. The restrictive provisions contained in the Otter Tail transmission agreements with the Bureau of Reclamation and rural electric cooperatives are subject to the application of the antitrust laws.

Dated: October 22, 1971.

EDWARD J. DEVITT
Chief Judge
United States District Court

JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

JUDGMENT

This case having come on to be heard, trial having been had and the Court having considered the evidence and briefs, and having issued a Memorandum and Order dated September 9, 1971, it is hereby

ORDERED, ADJUDGED, and DECREED that:

I.

This Court has jurisdiction of the subject matter of the action and the parties hereto under Section 4 of the Act of Congress of July 2, 1890, as amended, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (15 U.S.C. §4), commonly known as the Sherman Act.

II.

Defendant has attempted to monopolize and has monopolized interstate trade and commerce in the retail distribution of electric power in cities and towns located in its service area, in violation of Section 2 of the Sherman Act.

III.

The provisions of this Judgment applicable to the Defendant shall also apply to each of its officers, directors, agents and employees and to each of its subsidiaries, successors and assigns, and all persons, firms and corporations acting in its behalf or under its direction and control, and to all other persons in active concert or participation with any of them

who receive actual notice of this Judgment by personal service or otherwise.

IV.

Defendant is enjoined and restrained from:

(A) Refusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in any area serviced by Defendant;

(B) Refusing to wheel (transmit) electric power over its transmission lines from other electric power suppliers to existing or proposed municipal electric power systems in cities and towns located in any area serviced by Defendant;

(C) Instituting, supporting or engaging in litigation, directly or indirectly, against cities and towns, and officials thereof, which have voted to establish municipal electric power systems, for the purpose of delaying, preventing, or interfering with establishment of a municipal electric power system;

(D) Entering into, enforcing or claiming any rights under any contract, agreement or understanding which prohibits the use of Otter Tail's transmission lines to wheel (transmit) electric power from other electric power suppliers to existing or proposed municipal electric power systems;

(E) Entering into, enforcing, or claiming any rights under any contract, agreement or understanding which limits, allocates, restricts, divides or assigns the customers to whom, or the markets or territories in which, defendant or any other electric power supplier may sell electric power.

V.

For the purpose of determining or securing compliance with this Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division given to defendant

at its principal office, be permitted, subject to any legally recognized privilege:

(A) Access during the office hours of defendant to all contracts, agreements, correspondence, memoranda, and other business records and documents in the possession or control of defendant relating to any of the matters contained in this Judgment; and

(B) Subject to the reasonable convenience of defendant and without restraint or interference from it, to interview the officers and employees of defendant, who may have counsel present, regarding any such matters.

Upon such written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit written reports relating to any of the matters contained in this Judgment as may be requested.

No information obtained by the means provided in this Section V shall be divulged by any representatives of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Judgment, or as otherwise required by law.

VI.

Jurisdiction is retained for the purpose of enabling any of the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Dated: October 22, 1771.

EDWARD J. DEVITT
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
SIXTH DIVISION

(Title Omitted in Printing)

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ALTERNATIVE MOTIONS FOR A NEW TRIAL OR FOR AMENDED AND/OR ADDITIONAL FINDINGS OF FACT AND FOR AMENDED AND/OR ADDITIONAL CONCLUSIONS OF LAW, AND TO AMEND THE JUDGMENT ACCORDINGLY.

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AND

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NOTICE OF HEARING ON SAID MOTIONS AND CERTIFICATE OF SERVICE.

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[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
SIXTH DIVISION
CIVIL ACTION NO. 6-69-139.

(Title Omitted in Printing)

## ALTERNATIVE MOTIONS FOR A NEW TRIAL OR FOR AMENDED AND/OR ADDITIONAL FINDINGS OF FACT AND FOR AMENDED AND/OR ADDITIONAL CONCLUSIONS OF LAW, AND TO AMEND THE JUDGMENT ACCORDINGLY.

## MOTION FOR A NEW TRIAL.

Comes now the defendant, Otter Tail Power Company (Otter Tail), and moves the Court for a new trial herein, for the following reasons:

### I.

### THE FEDERAL POWER COMMISSION DECISION AND ITS BEARING ON THE WHOLESALE SERVICE ISSUE.

The Memorandum and Order of this Court was dated and filed on September 9, 1971. Four days later, on September 13, 1971, the Federal Power Commission issued its Opinion No. 603 in the case of *Elbow Lake, Minnesota v. Otter Tail Power Company*, Docket No. E-7278, a copy of which is attached to and made a part of this motion. The Federal Power Commission decision finds and asserts [2]* complete regulatory juris-

* Numbers in brackets [2] refer to page numbers in Original document.

diction under the Federal Power Act over the ordering of interconnections between the systems of investor-owned utilities and municipalities and the furnishing of wholesale service to municipalities, and the fixing of the terms and conditions of that service. The reasoning of the decision emphasizes that the public interest, and a balancing of the interests of the parties, are all protected in their broadest aspects within the ambit of regulation provided by Congress under the Federal Power Act. The decision establishes that the issue of furnishing wholesale service is within the jurisdiction of the Federal Power Commission. It further establishes that the regulatory process affords the opportunity to a municipality of sharing Otter Tail's facilities on fair terms, which fully satisfies the competitive requirements of the Sherman Act. We respectfully submit that these matters are established by the Federal Power Commission decision as a matter of law. Without waiving that position, if there be necessity for factual determinations in the area of adequacy of access or sharing or the resulting viability of the would-be competitor, then a further evidentiary hearing should be afforded to furnish a basis for appropriate findings and conclusions in that area.

II.

THE FEDERAL POWER COMMISSION DECISION AND ITS BEARING ON THE WHEELING ISSUE.

The Federal Power Commission decision in Opinion No. 603 also determines that ". . ., as a matter of law, we cannot compel Otter Tail to wheel Bureau of Reclamation Power to Elbow Lake. *City of Paris, Kentucky, v. Kentucky Utilities Company*, 41 F.P.C. 45 (1969)." (Also reported in 80 PUR 3rd 331). In *Paris*, the reasons for this determination were given—80 PUR 3rd at p. 335:

". . ., because Congress considered and affirmatively rejected a provision which would have made it the 'duty of every public utility to furnish energy to, exchange energy with, and *transmit energy for any person upon reasonable request therefor* . . .

[3] "(Sec. 202(a) of S 1725 and HR 5423, 74th Cong, 1st Sess. (Emphasis added)). It considered and rewrote a provision which would have given the commission the power to 'direct a public utility to . . . permit the use of its facilities by one or more other persons, or to . . . *transmit energy for*, or exchange energy with, one or more other persons . . .' (Sec. 203(b), of S 1725 and HR 5423, 74th Cong, 1st Sess. (Emphasis added)). In the report of the Senate Committee on the modification of old Sec. 203(b), which as rewritten was renumbered as Sec. 202(b), it was explicitly stated that '. . . the provisions of the old Sec. 203(b) empowering the Federal Power Commission to require one utility to permit the use of its facilities by another . . . have been eliminated; these matters are left to the voluntary action of the utilities.' (S Rep 621, 74th Cong, 1st Sess., p. 19.)"

This re-emphasizes the position that the Congress has rejected the imposition of compulsory wheeling as a matter of national policy. This statute was considered by Congress and enacted *after* Section 2 of the Sherman Act and represents the more recent statute passed by Congress on the subject. The imposition of the duty of compulsory wheeling upon Otter Tail by the decision and judgment of this Court should be re-examined upon a new trial of this action. There is no question but that the decision and judgment of this Court will have a far-reaching effect in restructuring the electrical industry on a national scope. The promoters of "Public Power", including

Alex Radin, general manager of the American Public Power Association, have stated that the decision has made "common carriers" of electric utilities (Washington Post, September 19, 1971). This is contrary to the intent of Congress as expressed in its establishing of the national policy in this statute. We submit that this appears as a matter of law. Without waiving that position, if there be necessity for a factual determination of the national effect and scope of the determination of the issue of compulsory wheeling in this case, or other factual matters, a further evidentiary hearing should be afforded to furnish a basis for appropriate findings and conclusions in that area, in view of the decision of the Federal Power Commission in Opinion 603.

[4] III.

## THE FEDERAL POWER COMMISSION DECISION AND ITS BEARING ON THE BALANCING OF INTERESTS AND THE RULE OF REASON.

The Federal Power Commission decision also recognizes the existence of the threat of erosion to Otter Tail's integrated system. The Commission states—

> "We also share the Examiner's view that Otter Tail is legitimately concerned about the possible erosion of its system. If other communities were to follow Elbow Lake's route, and if, having miscalculated the results, they could expect to be rescued by overly-generous interconnection terms, then Otter Tail's fears that it will lose its customers, seriatim, seem to us to be supported."

And, after stating the Commission's purpose to provide assistance to Elbow Lake, the decision states—

> "But our purpose is also to provide that assistance under terms that are fair to Otter Tail and its customers."

This emphasizes the need for the continuing application of regulatory expertise in the balancing of all benefits and detriments in the determination of the public interest. The inquiry does not stop with a finding of "scarce facility" and a blanket order for access. There is need for a delicate balancing of the competitive situation, and what is required to insure maintenance of competition on fair terms that afford a reasonable opportunity for economic survival and well being of the competitors. This includes a balancing of the need for access on the one hand, and the effect on, or the injury to, the customers of the utility on the other hand. The answer to the inquiry involves such vital considerations as,—"Does the maintenance of competition on fair terms require that access be granted, and, if so, under what conditions and under what rates should access be granted?" These questions involve matters [5] which are the responsibility of regulation by administrative bodies having an opportunity to acquire expertise in the field under regulation. The entire problem involves consideration of the proper roles of regulatory bodies and the Courts, in either regulating or ordering the affairs and conduct of operations of public utilities, a field of business which, in the broadest import of the term, is one of "regulated natural monopolies." In anti-trust parlance, the balancing of the various interests should be done under the application of the Rule of Reason. While this Court recognizes the existence of this rule in its decision, we respectfully submit that the decision shows that the Court did not apply the Rule of Reason to the facts and the evidence, or analyze carefully and in detail how the Rule of Reason bears on the competitive situation faced by the defendant, or the effect of the decision on that competitive situation. For example, does a municipality need access to Otter Tail's facilities to be viable as a competitor? If not, the

fact inquiry ceases. If it does, under what conditions and circumstances should it have access to become and be viable as a competitor? In weighing that determination, consideration should be given to the economic conditions created by the terms and conditions of access. As the Federal Power Commission warns, they should not be so generous as to encourage ill-advised and socially unacceptable action by municipalities. Further, we submit they should not be any more favorable to a municipality than is necessary to render a municipality viable. If the terms and conditions go beyond that, the very terms of access create an unfair competitive situation for the utility. That is what blanket compulsory wheeling may well do. It will superimpose on the economic competitive advantages that municipals and cooperatives now enjoy (freedom from most taxes, low capital costs, etc.) the transmission of underpriced government power by the use of the competitor's facilities. Competitive viability for the municipality could well be furnished by access to the utility's facilities via the route of wholesale service under proper terms and conditions, which is the route provided for by the Federal Power Commission and by the Congress in the present state of national policy set by the consideration and passage of Part II of the Federal Power Act. We respectfully submit that a new trial is required to furnish the opportunity for appropriate [6] consideration of these matters and an evidentiary hearing to furnish a basis for appropriate findings on factual matters which are involved.

## IV.

## ERRORS OF LAW OCCURRING DURING THE TRIAL.

A. The Court erred in overruling defendant's objections to the admission of evidence related to litigation, upon the

grounds that the instances of litigation each presented legitimate factual and legal issues for determination and were proper resorts to the respective tribunals in which each of them were brought, and were within the constitutional rights of the respective parties who initiated such litigation and are not subject to anti-trust attack.

The offers, statements of counsel, objections and rulings relating to this area, appear in the record in the following places:

Tr. Vol. I, pp. 18-21.

Tr. Vol. I, pp. 68-71.

Tr. Vol. I, pp. 104-107.

Ruling of the Court, Tr. Vol. I, pp. 102, 103.

B. The Court erred in overruling defendant's objections to the admission of evidence relating to campaign and publicity material and activities intended to influence government officials, the electorate, and other activities in the political arena, which were used or took place in towns in which a new municipal electric system was proposed, upon the grounds that such matters are immune from anti-trust attack under the Noerr-Pennington doctrine, and related cases. While the Judgment entered does not specifically enjoin such activities, the record is replete with evidence and exhibits relating thereto, and, we submit, was effectively used by the plaintiff in plaintiff's attempt to color defendant's activities, and was offered and used as evidence bearing upon defendant's alleged intent, which is an important issue in a Sherman Act case.

[7] The offers, statements of counsel, objections and rulings, in this area, appear in the record at the following places:

Tr. Vol. I, pp. 17-18.

Tr. Vol. I, pp. 65, 66.

Tr. Vol. I, pp. 71-73.
Tr. Vol. I, p. 87.
Tr. Vol. I, pp. 91-93.
Tr. Vol. I, pp. 103-107.
Ruling of the Court, Tr. Vol. I, pp. 102, 103.
Tr. Vol. IV, pp. 73-75, (GX 420, GX 421).
Ruling of the Court, p. 82.

C. The Court erred in overruling defendant's objections to the admission of evidence relating to occurrences which were remote in point of time, and generally were pre-1955, and as far back as the 1930's, upon the grounds that each of such items is remote in point of time and immaterial, and involved facts and situations and context vitally different from any issue in this case, and also such items are inadmissible under the pleadings, the complaint specifically alleging occurrences subsequent to 1955. We recognize that the Court ruled out some of this proffered evidence, but some of it was admitted, and we submit was effectively used by the plaintiff in the argument and submission of the case.

Offers, statements of counsel, objections and rulings, in this area, appear in the record at the following places:

Tr. Vol. I, pp. 21-23.
Tr. Vol. I, pp. 36-40. Ruling of the Court, p. 47.
Tr. Vol. I, p. 67.
Tr. Vol. I, pp. 77-79.
Tr. Vol. I, pp. 83, 84.
Tr. Vol. I, pp. 105-107.
Ruling of the Court, Tr. Vol. I, pp. 102-103.

D. The Court erred in sustaining plaintiff's objections to and ruling out of the realm of admissible evidence in the case, evidence that one of the major considerations by municipalities seeking to set up their own electric system and discontinue

receiving electric service from Otter Tail, was the profit motive, in the anticipation that, under municipal operation of the retail electric service, and by charging the same rates as Otter Tail, the municipality would realize profits which it could use for other municipal purposes and relieve the general tax burden of the community. We submit that such evidence is material in the consideration and evaluation of the competitive situation, and the economic viability of the municipal system as a competitor, and the balancing of the interests of the parties, and a determination of the overall public interest and the best use of the social resources involved. Illustrative of the Court's rulings in shutting out such evidence, with accompanying colloquy between the Court and counsel, including an offer of proof, appears in the record at Tr. Vol. II, pp. 36-40.

E. The Court erred in overruling defendant's objections to the receipt in evidence of engineering reports (otherwise called feasibility studies) prepared and submitted to municipalities by consulting engineers concerning prospective municipal electric systems upon the grounds that the respective engineers who prepared and submitted each study or report was not produced as a witness and subject to cross-examination in connection with each document.

Offers, statements of counsel, objections and rulings, in this area, appear in the record at the following places:

Tr. Vol. I, pp. 64, 65.

Tr. Vol. II, pp. 30-31 (GX 309).

F. The Court erred in overruling defendant's objection to the admissibility of GX 302 and GX 303 upon the grounds that they relate to Alexandria and are outside of the issues of this case. Tr. Vol. II, p. 4.

[9] G. The Court erred in overruling defendant's objections to the receipt in evidence of GX 353 and GX 354, upon the ground that each of said exhibits are letters written by and to third parties, and contain self-serving and prejudicial statements. Tr. Vol. II, pp. 108, 109.

H. The Court erred in overruling defendant's objections to the admission in evidence of GX 357 through GX 371 upon the grounds that each of these letters contains self-serving, hearsay, and prejudicial statements. Tr. Vol. III, pp. 10-14.

I. The Court erred in discouraging, and in effect ruling out, inquiry of Mr. Hartl concerning cooperatives entering into the competitive situation and encouraging municipal ownership and municipal power, upon the ground that such evidence is material in connection with the existence of the force and nature of the competition to which Otter Tail is subject and which it tries to meet. Tr. Vol. VII, pp. 66, 67.

J. *Muller Deposition.* Arrangements were made at the trial for defendant to furnish the Court with a statement of the places in the Muller Deposition where defendant made objections, and on which defendant wished to secure rulings (Tr. Vol. I, pp. 94, 95). Such a statement has been furnished to the Court. The following objections to portions of the Muller Deposition are restated here on the hypothesis of defendant's objections being overruled:

> GX 204 A, p. 105, l. 2, to p. 108, l. 13, which involves defendant's objections to negotiations between the Bureau of Reclamation and Minnesota Power & Light Company with reference to a possible transmission agreement, upon the ground that such evidence is immaterial and incomparable both in fact and point of time; and which was also objected to upon the ground that it was hearsay and involved a summary of conversations between a number

of people who were not present to be cross-examined. (GX 204 A, p. 109, l. 10-21).

[10] GX 204 A, p. 111, l. 123, to p. 112, l. 11, which relates to a conversation and discussion between the witness and a Mr. Speare, and is pure hearsay.

GX 204 A, p. 114, l. 10-18, which involves an objection to Mr. Muller testifying as to a conclusion of why the Bureau accepted a contract with Otter Tail which contained a certain provision, and concerning which he was not in a position to testify. (See p. 114, 115).

GX 204 A, p. 120, l. 13, to p. 122, l. 8, which relates to testimony with regard to the Bureau book costs of certain substations and interconnection equipment, which was objected to upon the ground that such evidence is immaterial.

GX 204 E, p. 71, l. 16, to p. 72, l. 12, which relates to questioning Mr. Muller as to the potential plant sites for development of additional Bureau power, and particularly to the nature of the questions as being leading and contrary to the testimony already given by the witness.

V.

EVIDENCE OF FACTS OCCURRING SUBSEQUENT TO THE TRIAL.

Defendant moves that a new trial be granted to furnish the opportunity to present evidence of facts concerning active competition in Otter Tail's service area which have occurred subsequent to the trial of the case, and involving the following municipalities:

A. *Britton, South Dakota.* The municipality of Britton, South Dakota, which has a population of 1,465, through its elected officials, is presently planning a municipal electric system, and has stated to officials of Otter Tail that its source

of power supply will be Basin Electric Cooperative through East River Electric Cooperative. This is regardless of the fact that Otter Tail's franchise in Britton does not expire for approximately ten years.

[11] B. *New Rockford, North Dakota.* The City of New Rockford, North Dakota, with a population of 1,969, has granted a limited franchise to furnish service at retail to Tri-County Electric Cooperative, Inc. This action has been taken by the City Council of the City of New Rockford. Tri-County Electric Cooperative will secure the power and energy to serve within the corporate limits of New Rockford from either the Bureau of Reclamation or Basin Electric Cooperative, or both, through Central Power Electric Cooperative.

C. *Sunburg, Minnesota.* The Village of Sunburg, Minnesota, with a population of 144, has granted an exclusive 25-year franchise to Kandiyohi Electric Cooperative. Kandiyohi Electric Cooperative will secure its power and energy to serve the retail business in the Village of Sunburg from either the Bureau of Reclamation or United Power Association, an electric cooperative, or both, through Rural Cooperative Power Association, an electric cooperative.

D. *Detroit Lakes, Minnesota.* The City of Detroit Lakes, Minnesota, with a population of 5,797, has advised Otter Tail that it intends to take over the service at retail of an area presently served at retail by Otter Tail, through annexation of the territory within the city limits. The additional power and energy to furnish retail service to these present customers of Otter Tail will come from the Bureau of Reclamation.

These facts should be added to the record as they support the ultimate fact that neither the Bureau of Reclamation nor the cooperatives are running out of a supply of power in fur-

nishing competition to serve the present retail electric loads of Otter Tail.

VI.

OTHER ERRORS

We respectfully submit that the Decision of the Court, with its accompanying Findings of Fact, Conclusions of Law, and Judgment, are not in accord with the competent and compelling evidence in the case and the law applicable thereto, and [12] that the ends of Justice will best be served by the granting of a new trial to reconsider the important issues and receive further evidence in areas which the Court deems fitting and proper, or on such other terms as the Court may determine.

WITHOUT WAIVING THE FOREGOING MOTION FOR A NEW TRIAL, THE DEFENDANT ALTERNATIVELY MAKES THE FOLLOWING— MOTIONS FOR AMENDED FINDINGS OF FACT AND/OR ADDITIONAL FINDINGS OF FACT

I.

DESCRIPTION OF OTTER TAIL POWER COMPANY

Defendant moves for the entry of the following additional Findings of Fact, which are compelled by the competent evidence in the record:

A. Otter Tail's integrated system has been built up over the past sixty years, and now brings the advantages of scale and modern technology in furnishing retail service to 465 small towns and rural customers located in thinly populated areas of the northwest. Otter Tail's territory is unique in that it has no metropolitan base, and serves no large centers of population. Of the 465 communities which it serves at retail, only 25 have a population of 1,500 or greater, and only 3 are

more than 10,000, with the largest being approximately 15,000.

B. Otter Tail has no exclusive franchises, or indeterminate permits (such as exist in some other states), to operate within the corporate limits of the towns served by its integrated system. In the municipalities where it serves, Otter Tail operates by virtue of nonexclusive franchises individually granted by each town for a limited term of years, which franchises periodically expire. Tr. Vol. VII, p. 39; Tr. Vol. X, p. 25; Dep. GX 287, pp. 19, 25.

C. Otter Tail's retail electric service, including its rates, service conditions and general rules and regulations, are subject to comprehensive regulation in North Dakota by the Public Service Commission of that State [13] (Title 49, North Dakota Century Code, and particularly Chapters 49-01 through 49-07; 49-09; and 49-20). Otter Tail maintains uniform rates and charges in the three states in which it operates, and, therefore, the North Dakota approved rates and practices are also put into effect in the States of Minnesota and South Dakota. There is no state regulatory body having jurisdiction of electric utilities in the States of Minnesota and South Dakota, but some regulation exists at the municipal level. Tr. Vol. VII, pp. 40-43; Tr. Vol. X, pp. 26, 27. Neither the reasonableness of Otter Tail's rates nor the adequacy of Otter Tail's service are otherwise a part of the issues presented by this case. Tr. Vol. I, pp. 127-135. Also see Tr. Vol. II, pp. 10-12, 36-39.

D. Otter Tail is subject to regulation at the Federal level by the Federal Power Commission under the Federal Power Act (Title 16, Chapter 12, USCA).

E. Otter Tail is a retail service company. The consistent and historic policy of Otter Tail has been and is to furnish

service at retail to the ultimate consumer. Otter Tail has never held itself out generally to furnish electric service at wholesale. This basic policy of Otter Tail was stated as early as 1947 as a part of Otter Tail's Electric Schedule Filings with the Federal Power Commission. GX 83, DX 89; Tr. Vol. VI, pp. 127-131; Tr. Vol. IX, pp. 3-6; Dep. GX 287, pp. 88-89, 174-176. This policy is also documented by provisions in special contracts to which Otter Tail is a party. GX 3 through GX 20. Also see Dep. GX 287, pp. 86-88. The few wholesale accounts Otter Tail once had were covered by special contracts and within the limitations of those contracts. With the availability of underpriced government power, the wholesale accounts covered by those special contracts left Otter Tail to become preference customers of the Bureau of Reclamation of the Department of the Interior of the United States. The last remaining wholesale contract expired in 1970 and Otter Tail is now completely divorced from the wholesale business. Tr. Vol. VI, pp. 132-136; Tr. Vol. IX, pp. 8, 9; Dep. GX 287, pp. 175-176. A distinction is made between what is termed "true wholesale service" (which is what is referred to above in this paragraph), and "pool transactions." "Pool transactions" are transactions under the Upper Mississippi Valley Power Pool and involve reciprocal exchanges of services (supplied on a take your [14] turn basis) under the particular provisions of the Pool Agreement, and, while they are classified as "sales for resale" in reports made to the Federal Power Commission they have characteristics which distinguish them from "true wholesale service." Tr. Vol. VI, pp. 128, 136, 137; Tr. Vol. VII, pp. 6-8; Tr. Vol. IX, pp. 58-67.

F. Otter Tail is not a common carrier of electric energy and has not dedicated its facilities to perform transmission or wheeling service generally. This is documented by provi-

sions in several contracts. Tr. Vol. VII, pp. 14, 15, 23; GX 67, p. 26, par. 26(f); GX 3 through GX 20 (see Article 3); GX 39, p. 4, par. 9; and GX 65, p. 4, par. 9.

II.

OTTER TAIL'S POLICY AND THE RULE OF REASON

Defendant moves that the following Findings of Fact be entered either as additional Findings of Fact or as amended Findings of Fact in lieu of Findings of Fact 204 through 219, upon the ground that the competent evidence in the record compels the entry thereof:

A. Otter Tail is subject to competition at all levels of the operation of its integrated system, which includes generation, transmission, and distribution. In addition to the ordinary sources of competition afforded by the possibility of towns erecting their own electric systems, Otter Tail's territory is peculiarly subject to additional competitive pressures by being within the marketing area of the Bureau of Reclamation which markets underpriced government power generated at the hydro-electric dams on the main stem of the Missouri River. Supplemental and in addition thereto is the competition from the rural electric cooperatives which are subsidized by capital loans at 2% interest under the Rural Electrification Act (7 USCA 901-913), exemption from income taxes, and other tax advantages. Tr. Vol. VII, pp. 36-47, 54-57; Tr. Vol. VI, pp. 133, 134; Tr. Vol. X, pp. 21, 24, 25, 39, 62-64; Dep. GX 204E, pp. 49-59; Dep. GX 204B, pp. 53-55.

[15] B. By following proper legal procedure, municipalities in each of the three states of Minnesota, North Dakota and South Dakota have the legal right to establish and operate municipal electric systems and oust the existing supplier from the municipality. Otter Tail is potentially subject to such ac-

tion of a municipality and ouster of Otter Tail in each of the 465 towns that it serves at retail by its integrated system. Agitation for a proposed new municipal system which would oust Otter Tail has occurred in several of Otter Tail's towns. Several towns served by Otter Tail's integrated system are watching the course and outcome of this case, as well as the Elbow Lake case before the Federal Power Commission. If Otter Tail is compelled to furnish its own facilities to aid or assist a new municipal electric system which would oust Otter Tail from the retail business in that town, either by furnishing wholesale service or by wheeling government power, there is real and imminent danger that this would furnish inducement and a path for towns on Otter Tail's system to oust Otter Tail's retail service and establish new municipal electric systems. Tr. Vol. VII, pp. 38-65; Dep. GX 287, pp. 285-287; Tr. Vol. I, pp. 139-141; Tr. Vol. II, pp. 60-62.

C. The competition to which Otter Tail is subjected is evidenced by the comparable resulting levels of costs of electric service at the municipal gate in the area, which are shown by the evidence to be from 5 to 12 mills for government power as compared to approximately 17 mills for Otter Tail. (DX 40, p. 3; Tr. Vol. IX, pp. 81-96; Tr. Vol. V, p. 83).

D. Otter Tail competes for the retail electric market in the area served by its system, using all fair and reasonable means at its command in doing so. Motivated solely by business considerations and in self-defense of its continued viability and existence, Otter Tail has adopted a policy of not furnishing Otter Tail's own facilities to aid or support another supplier in depriving Otter Tail of that market. Otter Tail reasonably believes that such a policy is essential to its survival as a competitive retail electric supplier in the area. In adopting this policy, Otter Tail has no predatory intent nor

does it [16] have any intent to acquire or damage any existing business. Otter Tail's policy and efforts are reasonably directed towards defending itself against erosion and impairment of its credit. Indeed, it permits Otter Tail to itself compete fairly for the market. To compel Otter Tail to furnish its own facilities to aid or support a competing supplier would give the competing supplier an unfair advantage in competing for the market. Such compulsion would ultimately result in Otter Tail's elimination from the field of competition for the market. Otter Tail has no intent to eliminate or restrain competition. Otter Tail expects to and does meet the competition. What Otter Tail objects to is furnishing its own facilities to assist a competitor in damaging or destroying its properties with resulting erosion of its integrated system and impairment of its credit. Tr. Vol. VII, pp. 38-65; Tr. Vol. X, pp. 25, 26, 36-47, 62-65.

E. The factual situation presented above, together with the economic forces involved therein and resulting therefrom, threaten erosion of Otter Tail's integrated system and the impairment of its credit. The Erosion Study presented by DX 41 demonstrates the economic effect of erosion upon Otter Tail, the cascading effect of the erosion process, and the imposition of the burden of a higher level of costs upon the remaining customers of Otter Tail. Tr. Vol. VII, pp. 38-65; Dep. GX 287, pp. 285-287; Tr. Vol. X, pp. 24-27, 29, 30, 36-47. Otter Tail now serves approximately 104,300 customers. As the erosion process results in towns and customers leaving Otter Tail's system, the benefits of scale now resulting from Otter Tail's integrated system being operated as a unit will decrease, and the embedded and remaining costs will be placed upon Otter Tail's remaining customers in increasing amounts. Its earning power will be reduced and the value of its distribution

properties destroyed. Tr. Vol. VII, pp. 47-51; Tr. Vol. X, pp. 39-42.

Otter Tail's credit in the money markets of the country would immediately be impaired, resulting in higher capital costs, and eventually in there being no market for Otter Tail's securities. Tr. Vol. VII, pp. 69-73; Tr. Vol. X, pp. 40-55; DX 96. This comes at a time when Otter Tail is faced with raising [17] some $69,800,000 of additional capital within the next five years. DX 96, Sheet 1. Tr. Vol. VII, pp. 72, 73, 113-116; Tr. Vol. X, pp. 48, 52-54. The resulting erosion and impairment of its credit would result in Otter Tail not remaining as a viable electric supplier in the area, and would lead to its ultimate destruction as a going concern. Tr. Vol. VII, pp. 97-114; DX 41; Dep. GX 287, pp. 285-287; Tr. Vol. X, pp. 40-54.

F. Defendant moves that Findings of Fact 205(d) and 207(e) be stricken, and in lieu thereof the following amended and/or additional Findings of Fact be entered:

It is a factual fallacy to state that either wholesale or wheeling service places no engineering or economic problems or burdens upon the utility furnishing the service. While the facilities of the same capacity will tend to be adequate to furnish the service at the moment of the switch-over from retail to wholesale or wheeling service, the so-called excess capacity of that moment will inevitably be dissipated by the continuing needs of all of the users of the transmission facilities of the supplying utility. Tr. Vol. VI, pp. 93-95.

G. Defendant moves that the following Findings of Fact be entered either as additional Findings of Fact or as amended Findings of Fact in lieu of Findings of Fact 209 through 212, upon the ground that competent evidence in the record compels the entry thereof:

(1) It is a prophecy which is subject to the criticism of being both speculative and unrealistic, to state that the Bureau of Reclamation and the rural electric cooperatives will not have a continuing supply of electric power and energy with which to compete in supplying electric retail service to towns served by Otter Tail's integrated system. In the past, the Bureau has periodically announced shortages of power, only to augment the supply corresponding with the cycles of Congressional appropriations, which in turn follow studies for increased supply of power. Tr. Vol. IV, pp. 16-18; Tr. Vol. VI, pp. 61-63; Tr. Vol. VIII, pp. 52, 53; Dep. GX 204A, p. 31; Dep. [18] GX 204C, pp. 58, 59. Both the Bureau and Basin Electric Cooperative are participating in current studies of great magnitude to enlarge the power supply resources of the north central portion of the United States, including specifically the Missouri Basin area. These studies, documented with references to the record, are as follows:

*Missouri Basin* System Group Power Study.

Tr. Vol. IV, pp. 23-35.

DX 23 (particularly at p. 28).

Tr. Vol. VI, pp. 8, 9, 63-69.

Dep. GX 204E, pp. 63, 64.

*North Central* Power Study.

Tr. Vol. IV, pp. 12, 13, 36-43.

Tr. Vol. VI, pp. 9, 10, 69-71.

DX 24.

Tr. Vol. VIII, pp. 58-64.

Dep. GX 204C, pp. 53-65.

Dep. GX 204E, pp. 64-66.

*Corps of Engineers* study to add 1,000,000 KW peaking capacity to the main stem dams on the Missouri River.

Tr. Vol. IV, pp. 39, 40.

Tr. Vol. VI, pp. 62, 63.
Tr. Vol. VIII, pp. 107, 108.
Dep. GX 204C, pp. 50-52.
Dep. GX 204D, pp. 14-15.
Dep. GX 204E, pp. 33-36, 67, 68.
Otter Tail Muller Deposition Ex. A—"Information On Additional Hydro-Power Study at Missouri River Main Stem Dams."
Dep. GX 287, pp. 266-268.

(2) Subdivision V of the Motion For a New Trial above, which sets forth facts occurring subsequent to the trial which further substantiate the continuing availability of additional competitive power supply from both the Bureau and the Co-operatives, is incorporated herein by reference.

[19] III.

## CONTRACTUAL PROVISIONS

Defendant moves that each of the following Findings of Fact be entered either as additional Findings of Fact or as amended Findings of Fact in lieu of Findings of Fact 220 through 226, upon the ground that the competent evidence in the record compels the entry thereof:

A. The current basic agreement between the United States of America, through the Bureau of Reclamation of the Department of the Interior, and Otter Tail, is dated June 14, 1955, and is identified as Contract No. I79r-1592, Supplement No. 2 (GX 67). This contract is a complex document and resulted from years of negotiation. Its main purpose was to coordinate certain facilities of the parties, which resulted in Otter Tail furnishing the use of its transmission facilities to the Bureau to permit the delivery of Bureau power to the then preference customers of the Bureau at specific locations, and the Bureau furnishing the use of its transmission facilities to Otter Tail,

within the limits and pursuant to the provisions provided in the agreement. Ancillary provisions provide for the furnishing of certain types of energy and service between the parties. The electric power and energy which Otter Tail has purchased from the Bureau is not firm power, but what is known as dump power and interruptible service. This Bureau-Otter Tail Contract is for a valid, proper and legal purpose. The Bureau-Otter Tail Contract is tied in with Special Municipal Electric Service Agreements with several municipalities (GX through GX 20), which are preference customers of the Bureau, and, under the terms of the Bureau-Otter Tail Contract, Otter Tail transmits Bureau power to these preference customers for the Bureau. As a part of the negotiations and considerations leading up to the successful consummation of the Bureau-Otter Tail Contract, the parties negotiated the wording of and the inclusion in the contract of a provision that the electric power and energy to be delivered by Otter Tail over its facilities to the preference customers of the Bureau was limited to preference customers which were located and use such power and energy outside the corporate boundaries of municipalities wherein Otter Tail then served at retail (GX 67, par. 27(c)(2), pp. 27-28). [20] The Bureau-Otter Tail Contract also provides that Otter Tail does not dedicate or intend to dedicate its facilities to the common carrying of electric energy for the account or use of the United States or anyone else (GX 67, par. 26(f), p. 26). These provisions in the Bureau-Otter Tail Contract, as well as similar provisions in Bureau Contracts with other utilities, were reasonably necessary in order to successfully negotiate and enter into the arrangements which accomplished the desired and proper purpose. Tr. Vol. VII, pp. 10-19; Dep. GX 204D, pp. 20-40; Dep. GX 204A, pp. 96-115; Dep. GX 204C, p. 48.

B. The main purpose of the Special Municipal Electric Service Agreements (GX 3 through GX 20) is to tie in with the Bureau-Otter Tail Contract and provide for wheeling Bureau power to the municipality in question as a preference customer of the Bureau. Incidental thereto, and as a part of the service package which was negotiated and resolved in these contracts are certain additional services as set forth in the contracts. As a part of each of these service agreements, there are clauses which provide (a) that Otter Tail does not dedicate or intend to dedicate its facilities to the common carrying of electric power and energy for the account of the Bureau, the Municipality, or anyone else, and (b) that it is agreed that Otter Tail is primarily in the retail business and does not hold itself out generally to serve wholesale purchasers, and also that none of the electric power and energy furnished to the municipality under the contract shall be used by the municipality to supply electric service to consumers now or hereafter receiving electric service from Otter Tail. (For illustration, see the Special Municipal Service Agreement with the Village of Tyler, GX 3, Sec. 4.4, p. 11). These clauses were reasonably necessary in order to successfully negotiate and enter into the arrangements provided for in said contracts which accomplish a desired proper and legal purpose. Tr. Vol. VII, pp. 19-23; p. 47-73.

[21] C. Otter Tail has also voluntarily negotiated and entered into agreements with Cooperatives (Tr. Vol. VII, pp. 27-36; GX 22 through GX 55; GX 57 through GX 62; GX 65; and GX 76 through GX 82), each of which agreements has for its main purpose the voluntary coordination of electric facilities, with ancillary provisions for exchanging other services.

D. One of such agreements is an Integrated Transmission Agreement between Cooperative Power Association (CPA)

and Otter Tail. The main purpose of this agreement is to integrate and coordinate certain transmission facilities of CPA and Otter Tail (as well as the facilities of other investor-owned utilities operating in adjacent areas with whom similar agreements were arrived at). These agreements are complex, and the many problems that needed to be resolved were the subject of long and good faith voluntary negotiation between the parties. The CPA-Otter Tail Agreement is for a valid, proper, and legal purpose. As a part of the negotiations and considerations leading up to the successful consummation of the CPA-Otter Tail Agreement, the parties negotiated the wording of and the inclusion in the agreement of a provision which, in substance, prevents either party from using the facilities of the other party which are thus coordinated to serve customers served by the other party. This provision in the CPA-Otter Tail Agreement, as well as similar provisions in contracts between CPA and other investor-owned companies, were reasonably necessary in order to successfully negotiate and enter into the coordinating arrangements which were provided for by the contract and which accomplished the desired and proper purpose. GX 22; Tr. Vol. VII, pp. 27-33; Tr. Vol. VI, pp. 80-81.

E. Other agreements with cooperatives include an agreement between Otter Tail and RSR Electric Cooperative, Inc. (Tr. Vol. VII, pp. 34-36; GX 38), and a transmission service agreement between Lyon-Lincoln Electric Cooperative, Inc. and Traverse Electric Cooperative, Inc. and Otter Tail Power Company (Tr. Vol. VII, pp. 34-36; GX 39). These agreements contain provisions which work both ways and prohibit each party from using the other party's facilities thus coordinated to serve customers then being served by the other party. Each of these clauses was reasonably necessary in order to success-

fully negotiate and enter into the arrangements provided for in these agreements which accomplish a desired, proper and legal purpose.

[22] F. The Cooperatives with whom Otter Tail has contracted are Rural Electric Cooperatives financed by the Rural Electrification Administration under the Rural Electrification Act. Each of the agreements between the Cooperatives and Otter Tail has been expressly approved by the Rural Electrification Administration of the United States. Tr. Vol. VII, pp. 31-36. See for examples the following exhibits, the approval usually being the last sheet attached to the contract: GX 22, GX 38, GX 39, GX 57, GX 65, GX 77 through GX 82.

G. None of the agreements referred to above in this Part III are territorial allocation agreements. On the contrary, they are agreements having as their main purpose the voluntary coordination of electric facilities, with the provisions in question being reasonably necessary to accomplish that valid purpose, and which provisions only reasonably restrict the use of the coordinated facilities.

## IV.

## ELBOW LAKE, MINNESOTA

Defendant moves that each of the following Findings of Fact be entered either as additional Findings of Fact or as amended Findings of Fact in lieu of Findings of Fact 9 through 59, upon the ground that the competent evidence in the record compels the entry thereof:

A. Otter Tail had served Elbow Lake, Minnesota, and its inhabitants with retail electric service since about 1913. GX 84, Stip. 1.

B. Otter Tail's franchise from the Village of Elbow Lake expired in 1960 and the Village of Elbow Lake declined to renew Otter Tail's franchise at that time. GX 84, Stip. 2.

C. An election was held in the Village of Elbow Lake, Minnesota, on January 23, 1962, at which the voters of Elbow Lake approved the establishment of a new municipal electric system. The question on the ballot submitted to the voters was:

[23] "Shall the Village of Elbow Lake construct a plant and system for the generation and distribution of electricity for light, heat and power at a total estimated cost of $715,000, and raise money therefor by the issuance of revenue certificates payable solely from the revenues of the plant and system?"

GX 84, Stip. 6.

D. The Village of Elbow Lake constructed a new municipal electric system to furnish the retail electric service in Elbow Lake, the construction of the municipal system being completed in June of 1966, at which time Otter Tail was compelled to cease to provide retail electric service in Elbow Lake. GX 84, Stip. 10.

E. The new municipal electric system in the Village of Elbow Lake secures its supply of electric power and energy from the newly constructed local electric generating plant in Elbow Lake in accordance with the plan for the municipal electric system which was submitted to the voters. GX 84, Stip. 11.

F. Prior to the construction of the new municipal electric system, and in 1964, the officials of Elbow Lake applied for and secured an allocation of firm power from the Bureau of Reclamation. GX 84, Stip. 12.

G. Consistent with Otter Tail's policy set forth above, Otter Tail declined to furnish its facilities to aid or support the new municipal electric system in Elbow Lake by furnishing either wholesale service or wheeling government power. GX 99, Tr. Vol. VII, pp. 47-54.

H. Elbow Lake had available feasible sources of power other than using Otter Tail's facilities for the new municipal electric system in Elbow Lake. These sources of power included, (a) local generation, which was the plan approved by the voters and actually adopted as a source of power (with additions as required) (Tr. Vol. IX, p. 73), (b) an independent transmission line built either by the Village or Missouri Basin Municipal Agency and operated in conjunction with local generation (Tr. Vol. V, pp. 97-98, 105-106; Tr. Vol. VI, pp. 14, 57; Tr. Vol. IX, p. 73), and (c) East River Electric Cooperative. (GX 5; Tr. Vol. IX, pp. 74, 75; Tr. Vol. V, p. 101).

[24] V.

HANKINSON, NORTH DAKOTA

Defendant moves that each of the following Findings of Fact be entered either as additional Findings of Fact or as amended Findings of Fact in lieu of Findings of Fact 60 through 104, upon the ground that the competent evidence in the record compels the entry thereof:

A. Otter Tail has served Hankinson, North Dakota and its inhabitants with retail electric service since about 1914. GX 84, Stip. 15.

B. Otter Tail's franchise from the municipality expired periodically and the City of Hankinson declined to renew Otter Tail's franchise in 1951. GX 84, Stip. 16.

C. The City of Hankinson requested and received an allotment of firm power from the Bureau of Reclamation. GX 84, Stip. 21.

D. An election was held in the City of Hankinson on October 22, 1963, at which the voters of Hankinson approved the establishment of a new municipal electric system. GX 84, Stip. 22.

E. Consistent with Otter Tail's policy set forth above, Otter Tail declined to furnish its facilities to aid or support the proposed new municipal electric system in Hankinson by furnishing wholesale service or wheeling government power. Tr. Vol. VII, pp. 47-54.

F. Hankinson had available feasible sources of power other than using Otter Tail's facilities for the proposed new municipal electric system. These sources of power included the Bureau of Reclamation (at voltages of either 115 KV or 69 KV at the Forman substation), Minnkota Electric Cooperative (at the voltage of 69 KV), and East River Electric Cooperative (at the voltage of 69 KV), the closest of these being the East River Electric Cooperative line (18 miles from Hankinson). Tr. Vol. IX, pp. 72, 73; Tr. Vol. VI, pp. 32-37.

[25] G. The political complexion of the City Council of Hankinson changed and in 1968 the controversy between the City of Hankinson and Otter Tail concerning the municipal power issue was resolved, and Hankinson granted a new franchise to Otter Tail and dismissed proceedings which Hankinson had brought against Otter Tail before the Federal Power Commission and in the United States District Court of North Dakota and also advised the Bureau of Reclamation that the City no longer wanted the allocation of Bureau power. DX 84, Stips. 28, 29; Tr. Vol. VII, p. 80.

VI.

COLMAN, SOUTH DAKOTA

Defendant moves that each of the following Findings of Fact be entered either as additional Findings of Fact or as amended Findings of Fact in lieu of Findings of Fact 105 through 137, upon the ground that the competent evidence in the record compels the entry thereof:

A. Otter Tail had served Colman, South Dakota, and its inhabitants with retail electric service since 1941, the property having been acquired by merger from a predecessor company, which predecessor company had served Colman since about 1920. GX 84, Stip. 30.

B. Otter Tail's franchise from the City of Colman expired in 1959, and the City of Colman declined to renew Otter Tail's franchise. GX 84, Stip. 31.

C. An election was held in the City of Colman on December 13, 1960, at which the voters of Colman approved the establishment of a new municipal electric system. GX 84, Stip. 39.

D. There were alternate sources of electric power and energy for the proposed new municipal electric system in Colman. GX 84, Stip. 38.

E. The City of Colman obtained an allotment of firm power from the Bureau of Reclamation as a preference customer. GX 84, Stip. 37.

[26] F. Sioux Valley Empire Electric Cooperative (Sioux Valley) is a cooperative having electric lines proximate to Colman and having its home office at Colman. Sioux Valley secures its supply of electric power and energy from East River Electric Power Cooperative, Inc. (East River), an electric cooperative, and East River in turn secures its supply of electric power and energy from the Bureau of Reclamation and from thermal generating plants of Basin Electric Power Cooperative, Inc., an electric cooperative. GX 84, Stip. 36.

G. In 1965, the City of Colman constructed a new municipal electric system to furnish the retail electric service in Colman, and at the time of commencement of its operation in June, 1965, Otter Tail was compelled to cease to provide retail electric service in Colman. GX 84, Stip. 43, and 45.

H. The new municipal electric system in the City of Colman secured its supply of electric power and energy through a connection with the electric lines of Sioux Valley Cooperative, which in turn secured power and energy from East River Cooperative, which in turn secured power and energy from the Bureau of Reclamation. GX 84, Stip. 44.

I. The City of Colman did not request the use of Otter Tail's facilities to aid or support the new municipal electric system in Colman, either to furnish wholesale service or to wheel government power. A cooperative line was immediately available and was actually used as the supply of power for the new municipal electric system. GX 84, Stip. 44; GX 307, pars. 4 and 5; Tr. Vol. IX, p. 46; Tr. Vol. IX, p. 17; Tr. Vol. VI, pp. 46, 47.

J. Sioux Valley operates and maintains the new municipal electric system in Colman under contract with the municipality. (GX 310, p. 38). The arrangement between Sioux Valley and Colman is comparable to the same maintenance and operation contract between Sioux Valley and Aurora. Tr. Vol. II, pp. 85, 86; DX 19.

[27] VII.

AURORA, SOUTH DAKOTA

Defendant moves that each of the following Findings of Fact be entered either as additional Findings of Fact or as amended Findings of Fact in lieu of Findings of Fact 138 through 166, upon the ground that the competent evidence in the record compels the entry thereof:

A. Otter Tail had served Aurora, South Dakota, and its inhabitants with retail electric service since 1941, the property having been acquired by merger from a predecessor company, which predecessor company had served Aurora since about 1916. GX 84, Stip. 46.

B. Otter Tail's franchise from the municipality expired periodically and the Town of Aurora declined to renew Otter Tail's franchise in 1961. GX 84, Stip. 47.

C. There were three elections held in Aurora relative to the establishment of a new municipal electric system, viz: (a) an election held on September 10, 1963, at which the voters of Aurora did not approve the new municipal electric system; (b) after securing an allotment of power from the Bureau of Reclamation in early 1965, a second election was held on May 18, 1965, at which the voters of Aurora approved the establishment of a new municipal electric system; and (c) on April 16, 1968, an election was held on the issue of repealing the action of the Town in authorizing bonds for the establishment of the new electric system, at which election the voters of Aurora voted against such repeal. GX 84, Stip. 54.

D. There were alternate sources of electric power and energy for the proposed new municipal electric system in Aurora. GX 84, Stip. 53.

E. Sioux Valley Empire Electric Cooperative (Sioux Valley) is an electric cooperative with electric lines in the Aurora area. Sioux Valley secures its supply of electric power and energy from East River Electric Power Cooperative, Inc. (East River), an electric cooperative, and East River [28] in turn secures its supply of electric power and energy from the Bureau of Reclamation and from thermal generating plants of Basin Electric Power Cooperative, Inc., an electric cooperative. GX 84, Stip. 52.

F. In the year 1968, the Town of Aurora constructed a new municipal electric system to furnish the retail electric service in Aurora, and at the time of commencement of its operation in July, 1968, Otter Tail was compelled to cease to provide retail electric service in Aurora. GX 84, Stip. 58, and 60.

G. The new municipal electric system in the Town of Aurora secured its supply of electric power and energy through a connection with the electric lines of Sioux Valley Cooperative, which in turn secured power and energy from East River Cooperative, which in turn secured power and energy from the Bureau of Reclamation. GX 84, Stip. 59.

H. The use of Otter Tail's facilities to aid or support the new municipal electric system in Aurora, either to furnish wholesale service or to wheel government power, was not involved, as a cooperative line was immediately available and was actually used as the supply of power for the new municipal electric system. Tr. Vol. II, pp. 79-84; GX 84, Stip. 59; GX 245, pars. 4 and 5; DX 17; DX 18; also see Tr. Vol. IX, p. 17; and Tr. Vol. VI, pp. 46, 47.

I. Sioux Valley operates and maintains the new municipal electric system in Aurora under contract with the municipality. DX 18; Tr. Vol. II, pp. 85, 86.

VIII.

FINLEY, NORTH DAKOTA

Defendant moves that each of the following Findings of Fact be entered either as additional Findings of Fact or as amended Findings of Fact in lieu of Findings of Fact 167 through 172, upon the ground that the competent evidence in the record compels the entry thereof:

[29] A. Otter Tail has served Finley, North Dakota, and its inhabitants with retail electric service since about 1926. GX 84, Stip. 61.

B. Otter Tail's franchise from the City of Finley expired in 1958 and has not been renewed. GX 84, Stip. 62.

C. At about that time, interest developed in the City of Finley in exploring the possibility of a municipal electric system. GX 84, Stip. 63.

D. Some of the citizens of the City of Finley were in favor of continuing with Otter Tail's electric service and were opposed to the establishment of a municipal electric system; and some of the citizens of Finley were in favor of establishing a municipal electric system. GX 84, Stip. 64.

E. One of the alternatives explored by the proponents of the new municipal electric system in Finley was for the City to become a preference customer of the Bureau of Reclamation in the purchase of electric power and energy for the new municipal electric system. GX 84, Stip. 66.

F. The City of Finley obtained an allotment of power from the Bureau of Reclamation. GX 84, Stip. 67.

G. There were alternate sources of electric power and energy for the proposed new municipal electric system in Finley. GX 84, Stip. 68.

H. There were two elections held in Finley within the past 15 years relative to the establishment of a new municipal electric system, viz: (a) an election held on April 4, 1960, at which the voters of Finley approved the construction of a new municipal electric system (the ballot did not contain the submission of the question of issuing bonds to finance it); and (b) an election held on November 17, 1964, at which the voters of Finley voted against the establishment of a new municipal electric system and against the issuance of municipal bonds to finance it. GX 84, Stip. 69.

[30] I. The City of Finley did not request the use of Otter Tail's facilities to aid or support the proposed new municipal electric system in Finley, either to furnish wholesale service or to wheel government power. GX 84, Stip. 68; GX 292K; GX 292A.

## IX.

## PLAINTIFF'S CLAIMS DO NOT INVOLVE A SUBSTANTIAL FLOW OF INTERSTATE COMMERCE

Defendant moves that the following additional Findings of Fact be entered upon the ground that the competence evidence in the record compels the entry thereof:

A. Plaintiff's factual claims were narrowed down to five towns, viz: Elbow Lake, Hankinson, Colman, Aurora and Finley. In four of these towns, the voters approved a proposal for a new municipal electric system (Elbow Lake, Hankinson, Colman and Aurora). Of these four, three of the towns have actually established a new municipal electric system, and have ousted Otter Tail from the retail electric service in those towns (Elbow Lake, Colman and Aurora). In the fourth town (Hankinson), a change of the political complexion of the City Council resulted in a resolution of the retail electric service problem by granting Otter Tail a new franchise and retaining Otter Tail's retail service. In the fifth town (Finley), the voters disapproved of a proposed municipal electric system. In only two of the five towns was the use of Otter Tail's facilities to aid or support the proposed new municipal electric system by either wholesale service or wheeling government power an issue (Elbow Lake and Hankinson). In these two towns, as stated above, Elbow Lake actually put in their new municipal electric system, and a change in the political complexion of the City Council resolved the problem in Hankinson. GX 84, Stips. 6, 10, 22, 28, 29, 39, 43, 44, 54, 58, 59, 69; Tr. Vol. VI, pp. 46-49, 57, 58; Tr. Vol. VII, p. 80; Tr. Vol. II, p. 60; Tr. Vol. IX, p. 17, 46, 47, 75; GX 307, pars. 4 and 5; GX 245, pars. 4 and 5; DX 17; DX 18. The evidence [31] presented by plaintiff as to these two towns out of a total of 465, and which rep-

résent less than 1% of the electric load served by Otter Tail's integrated system, is factually and legally insignificant and unsubstantial, and cannot support a Sherman Anti-Trust Case.

X.

RELEVANT MARKET

Defendant moves that each of the following Findings of Fact be entered either as additional Findings of Fact or as amended Findings of Fact in lieu of Findings of Fact 184 through 194, upon the ground that Findings of Fact 184 through 194 are based upon the erroneous premise of counting towns (which vary in size from Sibley, North Dakota, with a population of 20, to Moorhead, Minnesota, a city of 29,687), rather than being based upon the retail electric sales in the relevant geographic market area, and upon the ground that the competent evidence in the record compels the entry of the following Findings of Fact in regard thereto:

A. The geographic limits of the geographic relevant market are represented by Federal Power Commission Supply Area No. 26, which corresponds generally with the outer limits of the area served by Otter Tail's system. The Relevant Product Market is the electric retail sales within that geographic area. Suppliers of electric retail sales within that geographic area include investor-owned utilities, 45 municipal retail electric systems, 31 rural electric cooperatives which furnish service at retail both within and without municipal limits, and the Federal Government (Bureau of Reclamation) which furnishes retail service at several points in the area. Otter Tail's share of the electric retail sales within that geographic area is only 28.9% of the total electric retail sales. DX 94; Tr. Vol. IX, pp. 52-56, 107-112.

B. Rural electric cooperatives are continuously, actively, and aggressively competitive. Tr. Vol. IX, p. 109, 110; DX 98.

Also see Tr. Vol. VII, pp. 60-63; [32] Tr. Vol. VIII, pp. 73-76, 97-101; and see DX 88, p. 3, par. VII, and p. 10, par. C; also see Tr. Vol. II, pp. 61-63, 66; DX 9, and Tr. Vol. IX, pp. 10-12. The investor-owned segment represents potential competition in past or future planning and/or regulation. Tr. Vol. IX, pp. 86, 107, 108. The Bureau of Reclamation serves retail customers direct, most of them having been previous Otter Tail customers. Tr. Vol. IX, pp. 90, 91.

C. Defendant moves that the following specific portions of Finding of Fact 188 be stricken:

> "Rural electric cooperatives do not compete with Otter Tail to serve at retail any towns in which Otter Tail is the existing retail supplier." (Last three lines prior to Subparagraph (a) of Finding of Fact 188.)
>
> "The rural electric cooperatives do not attempt to obtain and do not compete for the retail distribution of power in towns served by Otter Tail." (First three lines of Subparagraph (a) of Finding of Fact 188.)
>
> "The Rural Electrification Act does not permit the lending of funds so as to permit a cooperative to provide electric power to towns which are already receiving central station service." (First four lines of Subparagraph (b) of Finding of Fact 188.)
>
> "The Rural Electrification Act does not permit the lending of funds so as to permit cooperatives to provide service to towns which have 1,500 or more inhabitants." (First four lines of Subparagraph (c) of Finding of Fact 188.)

upon the grounds that each of said Findings is not supported by the evidence or the law, and the statements therein are misleading. Defendant moves that the Following Findings of Fact be substituted in lieu thereof:

(1) The Rural Electrification Act does provide for the Administrator making loans to finance REA's to furnish electric service in "rural" areas to persons "who are not receiving central station service." However, the Courts have uniformly held that once the loan is made, these provisions do not inhibit competitive activities of the cooperatives, and that an investor-owned utility which is subject to that competition has no standing in the Courts to restrain it. *Missouri Power & Light Co. v. Lewis County Rural Electric Co-op. Ass'n.*, [33] 235 Mo. App. 1056, 149 S.W. 2d 881; *Otter Tail Power Company v. Sioux Valley Elec. Co-op.*, 131 N.W. 2d 111 (S.D. 1964); *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924 (D. Col. Ct. 1955), cert. den. 350 U.S. 884; *Alabama Power Company v. Ickes*, 302 U.S. 464, 58 S. Ct. 300, 82 L. Ed. 374 (1938); *Rural Electrification Administration v. Northern States Power Company*, 373 F. 2d 686 (8th Ct. 1967).

(2) Rural electric cooperatives do serve towns both at wholesale and at retail within Otter Tail's service area, which is illustrated by retail service to 105 towns (DX 98; Tr. Vol. X, pp. 81, 82); and by wheeling, wholesale and/or auxiliary services to Alvarado, Bagley, Fosston, Halstad, Hawley, Madison, Perley and Thief River Falls, Minnesota, and Cavalier, Grafton, Hope, Maddock, Northwood, Park River, and Sharon, North Dakota, and Arlington, Aurora, Colman, and Volga, South Dakota; and the cooperatives have offered similar services to Velva and Finley, North Dakota, and to White, Rutland and Britton, South Dakota. (GX 211, Sheets 4-6 and 8-11); DX 94; DX 98; GX 439; Tr. Vol. VII, pp. 60-63; Tr. Vol. VIII, pp. 73-76, and 97-101; DX 88, p. 3, par. VIII, and p. 10, par. C). Retail electric sales by rural electric cooperatives within towns having a population in excess of 1,500 are illus-

trated by the following: Cando, North Dakota, with a population of 1,512, West Fargo, North Dakota, with a population of 5,161, Carrington, North Dakota, with a population of 2,491, and New Rockford, North Dakota, with a population of 1,969. (DX 98; DX 94; GX 289, Dep. p. 11-15; population figures taken from the 1970 Census).

XI.

TRANSMISSION LINES IN THE AREA

Defendant moves that the following Findings of Fact be entered either as additional Findings of Fact or as amended Findings of Fact in lieu of Findings of Fact 195 through 201, upon the ground that Findings of Fact 195 through 201 are based on the erroneous premise of not taking into consideration all of the [34] transmission and electric lines within Federal Power Commission Supply Area No. 26, and upon the ground that the competent evidence compels the entry of the following Findings of Fact with regard thereto:

A. Electric lines of other suppliers within the area at various voltages (115 KV, 41.6 KV, 69 KV, and 12.5 KV) proliferate the geographic market area and furnish competitive sources of power to the towns served at retail on Otter Tail's integrated system. Tr. Vol. IX, pp. 36-51, 97; DX 92; DX 93. Also see Tr. Vol. VII, pp. 36-38, 40-41, 60-65; and Tr. Vol. VI, pp. 46-49, 57, 58.

B. Otter Tail owns only 8% of the total mileage of the electric lines of all suppliers within Federal Power Commission Supply Area No. 26. Tr. Vol. IX, pp. 26-28, 57, 58; DX 91.

C. There is no proof in the record that the lower voltage lines of the cooperatives will not furnish competitive sources of power to towns served at retail on Otter Tail's system, with the possible exception of plaintiff's claims with reference to

only two towns (Elbow Lake and Hankinson). Tr. Vol. VI, pp. 56, 57. On the contrary, the affirmative evidence shows that all of the towns within the illustrative areas covered by DX 92 and DX 93 can be served directly by cooperative lines (Tr. Vol. IX, p. 97); and that Aurora and Colman are served by cooperative lines (Tr. Vol. IX, pp. 17, 46, 47, 75; and Vol. VI, pp. 46-49, 57, 58; and see GX 84, Stips. 44, 59; GX 307, pars. 4 and 5; GX 245 pars. 4 and 5; and DX 17; and DX 18), and that cooperatives planned to serve Velva, Towner, Finley, Rutland, and White (Tr. Vol. VII, pp. 60-62; Tr. Vol. VIII, pp. 74-76, 97-99; Tr. Vol. IX, pp. 76, 40-51; and DX 88), and also do serve other municipalities in Minnesota (Tr. Vol. VIII, pp. 100, 101).

D. Otter Tail is not dominant in the transmission and distribution of electric power and energy in the geographic market area.

[35] E. Further illustrative of Otter Tail's lack of substantial dominance in transmission in the area is the fact that of the 45 present municipal systems in the area, 44 of them receive power from the Bureau of Reclamation, and only 17 of the 44 receive Bureau power wheeled over Otter Tail's lines. The kilowatt-hour sales by these 44 towns total 535,724,657 KWH. The kilowatt-hour sales in the 17 towns to which Otter Tail wheels Bureau power over its lines total 162,369,179 KWH. The related percentage shows that Otter Tail's share of this area of transmission is only 30.3% (DX 94, pp. 3, 4; GX 211, Sheets 4-6 and 8-11; GX 3 through GX 20; GX 439; Tr. Vol. V, pp. 23-27). The following schedule presents the details developing these figures and the resulting percentage:

## PRESENT MUNICIPAL SYSTEMS IN FEDERAL POWER COMMISSION SUPPLY AREA 26

| | KWH SALES (Sch. B, DX 94) | |
|---|---|---|
| *Municipality* | *Transmission Service Furnished By Otter Tail* | *Transmission Service Furnished By Others* |
| Ada (MN) | | 7,757,915 |
| Alexandria (MN) | 46,047,902 | |
| Alvarado (MN) | | 778,670 |
| Arlington (SD) | | 4,020,546 |
| Aurora (SD) | | 680,560 |
| Badger (SD) | 528,565 | |
| Bagley (MN) | | 6,342,773 |
| *Barnesville (MN) | 5,811,270 | |
| Benson (MN) | 15,869,192 | |
| Big Stone City (SD) | 4,062,312 | |
| Breckenridge (MN) | 14,794,240 | |
| Brookings (SD) | | 35,441,005 |
| Cavalier (ND) | | 6,906,940 |
| Colman (SD) | | 2,081,388 |
| Detroit Lakes (MN) | 38,069,000 | |
| East Grand Forks (MN) | | 28,386,070 |
| Estelline (SD) | 2,647,582 | |
| Flandreau (SD) | | 9,138,144 |
| Fosston (MN) | | 9,007,500 |
| Grafton (ND) | | 22,400,518 |
| Halstad (MN) | | 2,988,914 |
| Hawley (MN) | | 4,394,388 |
| Henning (MN) | 3,047,022 | |

*Transmission service furnished by both Otter Tail and Lake Region Electric Cooperative.

| | | |
|---|---|---|
| Hillsboro (ND) | | 5,303,395 |
| Hope (ND) | | 1,489,875 |
| [36] | | |
| Lake Park (MN) | 1,690,054 | |
| Lakota (ND) | | 5,818,510 |
| Maddock (ND) | | 3,154,939 |
| Madison (MN) | | 9,937,974 |
| Moorhead (MN) | | 118,124,580 |
| Newfolden (MN) | 845,816 | |
| Nielsville (MN) | 399,960 | |
| Northwood (ND) | | 5,804,890 |
| Ortonville (MN) | 13,147,903 | |
| Park River (ND) | | 6,741,769 |
| Perley (MN) | | 375,368 |
| Sharon (ND) | | 841,232 |
| Shelly (MN) | 609,081 | |
| Stephen (MN) | 3,454,801 | |
| Thief River Falls (MN) | | 36,206,000 |
| Tyler (MN) | 4,989,798 | |
| Valley City (ND) | | 37,831,615 |
| Volga (SD) | | 1,400,000 |
| Warren (MN) | 6,354,681 | |
| | 162,369,179 | 373,355,478 |

| | |
|---|---|
| Transmission by Otter Tail | 162,369,179 |
| Transmission by Others | 373,355,478 |
| Total | 535,724,657 |
| Otter Tail's share of total | 30.3% |

## XII.
## LITIGATION

**Defendant moves that Findings of Fact 14-17, 28-31, 35, 36, 95-101, 116, 118, 119, 121, 123, 126, 128, 130-133, 146, 151-153, 159, 160, 166, 202, and 203, and each of them, be stricken, for the reason that each of said Findings of Fact relates to the area of Litigation, and is objected to upon the same grounds as the evidence relating to Litigation was objected to, as stated above in the Motion For A New Trial. Defendant specifically objects to any [37] Finding of Fact that any instance of litigation was brought solely for the purpose of preventing or causing delay in the establishment of a competing municipal electric system, upon the ground that the record clearly shows that each instance of litigation presented legitimate factual and legal issues to the Courts for consideration within the constitutional rights of the parties. Without waiving the above, and if the foregoing motion be denied, and if there are to be any Findings of Fact in the area of Litigation, defendant moves for the entry of the following Findings of Fact which are compelled by the competent evidence in the record:**

A. Each of the pieces of litigation presented legitimate factual and legal issues to the Courts or Commissions for consideration and decision, and the resort by the parties involved to the Courts or Commissions to have such issues heard and determined was in good faith, was not an abuse of the judicial process, and was within the constitutional rights of the parties involved. Documentation as to the evidence relating to the area of Litigation includes the following:

Elbow Lake, Minnesota—DX 87, and DX 42 through DX 59; GX 105 through GX 106A, GX 110.

Colman, South Dakota—DX 87, and DX 60 through DX 72; GX 150 through GX 167.

Aurora, South Dakota—DX 87, and DX 73 through DX 86; GX 186 through GX 198.

Hankinson, North Dakota—GX 84, par. 29. Tr. Vol. VII, pp. 76 through 78. GX 131 through GX 140.

B. Any item of litigation in which Otter Tail was a plaintiff was brought for the purpose of presenting to the Courts for consideration and decision legitimate factual and legal issues relating to the legality of the proceedings or process which would result in injury to and destruction of Otter Tail's business and properties, and the ousting of Otter Tail from serving at retail in the community involved. Consideration of the bringing of each such case was determined on the merits and with the advice of counsel, and Otter Tail has no general policy with reference to the subject of litigation. Tr. Vol. VII, pp. 74-79; Dep. GX 287, pp. 283, 284.

[38] XIII.

## PUBLICITY MATERIAL AND ACTIVITIES

Defendant moves that Findings of Fact 18, 22, 32, 37, 39, 40, 48, and 132, and each of them, be stricken, upon the ground that each of said Findings of Fact relates to publicity material and activities and offers intended to influence government officials, the electorate, or the citizenry, which matters are immune from anti-trust attack under the Noerr-Pennington doctrine, and other related decisions.

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## MOTIONS FOR AMENDED AND/OR ADDITIONAL CONCLUSIONS OF LAW

Defendant moves that Conclusions of Law I through V be stricken, and that the following Conclusions of Law be entered in lieu thereof, upon the ground that the law applicable to the competent evidence in the record requires the same:

I.

The sale of electric power for resale in interstate commerce, together with the terms and conditions of such service, is within the pervasive scheme of regulation entrusted by the Congress to the Federal Power Commission under Part II of the Federal Power Act (16 USCA 824-824h), and is within the Primary Jurisdiction of the Federal Power Commission.

II.

The imposing of the obligations of a common carrier for compulsory wheeling of electric energy upon the transmission lines of investor-owned utilities, is a matter of national policy which the Congress of the United States has rejected as a national policy up to this time, and it is not within the jurisdiction of this Court to establish such a policy contrary to Congressional intent.

[39] III.

Plaintiff has failed to sustain the burden of proof in proving a violation by defendant of Section 2 of the Sherman Act.

IV.

Plaintiff's claims do not involve a substantial flow of interstate commerce.

V.

Federal Power Commission Supply Area No. 26 is the geographic relevant market area, and the retail electric service within that area is the Relevant Product Market. Defendant Otter Tail Power Company does not control a dominant share of that relevant market. Defendant Otter Tail Power Company's transmission lines are not dominant in the transmission or distribution of electric power and energy within the geographic relevant market area.

VI.

Defendant Otter Tail Power Company's policy of not furnishing its own facilities to aid or support another supplier in depriving Otter Tail of a market for retail electric service which Otter Tail is then serving, is without predatory intent, is motivated solely by reasonable business considerations and is in reasonable defense of its continued viability and existence, and is reasonably directed towards defending itself against the destruction of its properties, erosion of its integrated system, and impairment of its credit, and is within the "Rule of Reason" under the Sherman Act decisions.

VII.

The instances of litigation which appear in this record presented legitimate factual and legal issues for determination and were proper resorts to the respective tribunals in which each of them were brought, and were within the constitutional rights of the respective parties who initiated each case, and are not subject to anti-trust attack.

[40] VIII.

To compel Otter Tail Power Company to use its own facilities to aid or support a new municipal system which puts Otter Tail out of the retail electric business in that municipality, and establishes a precedent which will damage or destroy the value of its property, erode Otter Tail's integrated system and impair its credit, constitutes the taking of Otter Tail's property without due process of law or just compensation in violation of its constitutional rights under Article V of the Amendments to the Constitution of the United States.

IX.

The defendant, Otter Tail Power Company, has not violated Section 2 of the Sherman Act (15 USCA 2).

X.

This action is dismissed on its merits, and the defendant shall recover its costs and disbursements as provided by law.

LET JUDGMENT BE ENTERED ACCORDINGLY.

[41]

## MOTION TO AMEND THE JUDGMENT ACCORDINGLY

Defendant moves that the Judgment be amended accordingly, by striking each of the paragraphs in the Judgment, and inserting the following in lieu thereof:

It is ORDERED, ADJUDGED, and DECREED that:

I.

The sale of electric power for resale in interstate commerce, together with the terms and conditions of such service, is within the pervasive scheme of regulation entrusted by the Congress to the Federal Power Commission under Part II of the Federal Power Act (16 USCA 824-824h), and is within the Primary Jurisdiction of the Federal Power Commission.

II.

The imposing of the obligations of a common carrier for compulsory wheeling of electric energy upon the transmission lines of investor-owned utilities, is a matter of national policy which the Congress of the United States has rejected as a national policy up to this time, and it is not within the jurisdiction of this Court to establish such a policy contrary to Congressional intent.

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Without waiving Paragraphs I and II above, the defendant moves that the Judgment be amended as follows:

III.

Plaintiff has failed to sustain the burden of proof in proving a violation by defendant of Section 2 of the Sherman Act.

IV.

Plaintiff's claims do not involve a substantial flow of interstate commerce.

[42] V.

Federal Power Commission Supply Area No. 26 is the geographic relevant market area, and the retail electric service within that area is the Relevant Product Market. Defendant Otter Tail Power Company does not control a dominant share of that relevant market. Defendant Otter Tail Power Company's transmission lines are not dominant in the transmission or distribution of electric power and energy within the geographic relevant market area.

VI.

Defendant Otter Tail Power Company's policy of not furnishing its own facilities to aid or support another supplier in depriving Otter Tail of a market for retail electric service which Otter Tail is then serving, is without predatory intent, is motivated solely by reasonable business considerations and is in reasonable defense of its continued viability and existence, and is reasonably directed towards defending itself against the destruction of its properties, erosion of its integrated system, and impairment of its credit, and is within the "Rule of Reason" under the Sherman Act decisions.

VII.

The instances of litigation which appear in this record presented legitimate factual and legal issues for determination and were proper resorts to the respective tribunals in which each of them were brought, and were within the constitutional rights of the respective parties who initiated each case, and are not subject to anti-trust attack.

VIII.

To compel Otter Tail Power Company to use its own facilities to aid or support a new municipal system which puts Otter Tail out of the retail electric business in that municipality, and establishes a precedent which will damage or destroy the value of its property, erode Otter Tail's integrated system and impair its credit, constitutes the taking of Otter Tail's property without due process of law or just compensation in violation of its constitutional rights under Article V of the Amendments to the Constitution of the United States.

[43] IX.

The defendant, Otter Tail Power Company, has not violated Section 2 of the Sherman Act (15 USCA 2).

X.

This action is dismissed on its merits, and the defendant shall recover its costs and disbursements as provided by law.

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Without waiving the foregoing, and in the event that the foregoing be denied, defendant moves that the Judgment be amended by the addition of the following:

XI.

The defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service to a municipality except as provided under the pervasive scheme of regulation of wholesale electric service in interstate commerce entrusted by the Congress to the Federal Power Commission under the provisions of the Federal Power Act, and except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission.

If the last preceding amendment be denied, and, without waiving the same, defendant moves that the Judgment be amended as provided in the next succeeding paragraph:

XII.

The defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission.

The defendant further moves that the Judgment be amended as follows:

[44] XIII.

The defendant shall not be compelled by the Judgment in this case to use defendant's electric lines to furnish wheeling service to a municipality unless and until the Congress establishes a national policy for such compulsory wheeling by granting power to the Federal Power Commission to order such compulsory wheeling, or by other appropriate Congressional action.

If the last preceding amendment be denied, and, without waiving the same, defendant moves that the Judgment be amended as provided in the next succeeding paragraph:

XIV.

The defendant shall not be compelled by the Judgment in this case to furnish wheeling service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission.

XV.

The defendant shall not be prevented by the Judgment in this case from presenting legitimate factual and legal issues to any Court for determination, the resolving of which issues

would have an effect on the business or properties of the defendant.

Dated October 27, 1971.

Respectfully submitted,
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[46] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO. 608
Docket No. E-7278

VILLAGE OF ELBOW LAKE, MINNESOTA
v.
OTTER TAIL POWER COMPANY

APPEARANCES

*I. L. Swanson* for Village of Elbow Lake, Minnesota
*Cyrus A. Field* and *David F. Lundeen* for Otter Tail Power Company
*C. Emerson Duncan, II* for Missouri Basin Municipal Agency
*Watt N. Martin* for the Staff of the Federal Power Commission

[47] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., and Pinkney Walker.

OPINION NO. 608
Docket No. E-7278

VILLAGE OF ELBOW LAKE, MINNESOTA
v.
OTTER TAIL POWER COMPANY

OPINION AND ORDER AUTHORIZING
INTERCONNECTION OF FACILITIES
(Issued September 13, 1971)

CARVER, Commissioner:

1. Once again we turn to the interconnection dispute between the Village of Elbow Lake and the Otter Tail Power Company. The essential question now before us is whether a long-term interconnection between Elbow Lake and Otter Tail is in the public interest. We join the Examiner in believing that it is.

2. Elbow Lake is a Minnesota village with a population of about 1500. Otter Tail is an investor-owned public utility which serves about 460 small communities in Minnesota, North Dakota, and South Dakota. Elbow Lake was among Otter Tail's customers from 1913 until June of 1966, but in 1960 Otter Tail's franchise to serve Elbow Lake expired, and Elbow Lake did not renew it. Instead, beginning in the early 1960's Elbow Lake sought without success to buy power at wholesale from Otter Tail. It also sought, equally without success, to buy from Otter Tail that portion of Otter Tail's distribution system that was located in Elbow Lake. In 1962, 77 percent of Elbow Lake's voters approved a bond issue looking toward a municipal power system, and that system, consisting of two small diesel generating units (each with a nameplate rating of 1136 KW, and a two-hour overload capability of 1250 KW), and a distribution system constructed by Elbow Lake (Otter Tail having removed its lines, at some loss to itself), began operations in June 1966.

[48] 3. In March 1966, even before its own system commenced operations, Elbow Lake turned to this Commission for help in meeting its bulk power supply problem. In letters filed in February 1968, Elbow Lake refined its request, and it then asked for an emergency interconnection with Otter Tail under section 202(c) of the Federal Power Act. Section 202(c) permits temporary interconnections during times of

war or during certain emergencies. We ordered hearings, and thereafter, in our Opinion No. 551 of November 6, 1968 (40 FPC 1262), we ordered a short-term interconnection under section 202(b). In that opinion we found that Elbow Lake suffered from a shortage of installed reserves, and thus that its system failed to meet an adequate standard of reliability; we found it unnecessary to decide whether an emergency existed under section 202(c) of the Act, because we concluded that we were able to act under section 202(b); we ordered a short-term interconnection; and we ordered further hearings on the question of a long-term interconnection. Our action was affirmed by the Court of Appeals for the Eighth Circuit, *Otter Tail v. F.P.C.*, 429 F. 2d 232 (1970), cert. den. 401 U.S. 947 (1971). A subsequent dispute as to the details of the interconnection was resolved by the Initial Decision of Examiner Ames C. Williams on September 2, 1969, which decision we affirmed and adopted on December 5, 1969, 42 FPC 1082.

4. Hearings on the question of a long-term interconnection have proceeded. In his Initial Decision of January 14, 1971, on this question, Examiner Williams has concluded that a long-term interconnection should be ordered. Exceptions to that Decision have been filed by Otter Tail, by the Staff, and jointly by Elbow Lake and the intervenor, the Missouri Basin Municipal Power Agency. Otter Tail and the Staff have filed briefs opposing exceptions.

5. The Initial Decision affords to Elbow Lake three options. First, Elbow Lake could elect to take all of its requirements from Otter Tail, in which event Elbow Lake would be required to pay for the power at rates based upon Otter Tail's fully-allocated cost of firm, wholesale service. (Such rates the Examiner derived from Otter Tail's testimony as to its fully allocated cost, and no question was raised as to these rates on

cross-examination.) Second, Elbow Lake could elect to [49] take less than its full energy requirements from Otter Tail, in which event also, under the Examiner's Decision, Elbow Lake would pay at rates based upon Otter Tail's fully-allocated cost. Third, Elbow Lake would have, implicitly, the choice of not interconnecting, and of thus continuing its isolated operations.

6. We agree that an interconnection should be available to Elbow Lake, but we would prescribe somewhat different terms and conditions.

7. In so doing, we are mindful of two basic considerations that are present in this case, considerations which are not instantly reconcilable. On the one hand, it is entirely clear to us that the power consumers of Elbow Lake need help. The record shows that the demands placed upon the isolated Elbow Lake system have several times come within a few KW's of the maximum capacity of one of its two generators, thereby threatening Elbow Lake's firm power supply. In the face of this reality, we are compelled by section 202(b) of the Power Act to provide assistance, if an acceptable interconnection arrangement is available. An interconnection arrangement, meeting all of the tests of section 202(b), is here available. That is so because the record is clear that Otter Tail is capable of serving all of Elbow Lake's power needs without encountering any of the constraints set forth in section 202(b). Thus, if Otter Tail were to supply all of Elbow Lake's requirements, it would sustain no "undue burden" thereby; no "enlargement of generating facilities" would be required; and Otter Tail's "ability to render adequate service to its customers" would not be impaired. In these circumstances, we believe that the public interest indisputably requires an interconnection.

8. On the other hand, we cannot disagree with the Examiner's view that Elbow Lake has engaged in "an ill-advised excursion into the power business." Given the facts of record brought before us, it is plain that Elbow Lake's effort has not brought it the rewards it expected; indeed, its first year of operations, during which it perpetuated the rates formerly charged by Otter Tail, resulted in a financial loss. Unlike Otter Tail's earlier service to Elbow Lake, Elbow Lake's own system is of doubtful reliability, as evidenced by its presence before us now. And further, this record displays other evidences of serious economic [50] waste. Otter Tail, having refused to sell its distribution lines to Elbow Lake, thereupon ripped them out, and sustained a loss of revenue in their sale as salvage. Elbow Lake installed a duplicate distribution system. All who have been involved—Otter Tail, Elbow Lake, and the customers of each—have been the losers. While it is our responsibility to take all possible steps to insure to Elbow Lake's customers a high standard of service reliability, our terms and conditions must not invite improvident ventures elsewhere.

9. We also share the Examiner's view that Otter Tail is legitimately concerned about the possible erosion of its system. If other communities were to follow Elbow Lake's route, and if, having miscalculated the results, they could expect to be rescued by overly-generous interconnection terms, then Otter Tail's fears that it will lose its customers, seriatim, seem to us to be supported. We do not mean by this that we accept a captive market concept, however. The public interest is far broader than the economic interest of a particular power supplier. It is our legal responsibility, as the Supreme Court made clear in *Pennsylvania Water Co. v. F.P.C.*, 343 U.S. 414 (1952), to use our statutory authority to assure "an abundant supply of electric energy throughout the United States," and

particularly to use our statutory power under section 202(b) to compel interconnection and coordination when the public interest requires it. The exercise of that authority may well require, as it does here, that we order a public utility to interconnect with an isolated municipal system. The private company's lack of enthusiasm for the arrangement cannot deter us, so long as the public interest requires it.

10. Clearly, any municipality contemplating an entry into the power business would be well-advised to review carefully the consequences of the actions taken by the parties now before us. Any such municipality should identify and study all of the alternatives and their probable consequences with patience and skill; and it should do so before new generators are bought, installed, and brought on the line. This Commission's opinion in the *Gainesville* case, 40 FPC 1227 (1968), recently affirmed by the Supreme Court, *Gainesville Utilities Department v. Florida Power Corporation*, —— U.S. —— (May 24, 1971), will be helpful in those circumstances. Municipalities, and private power suppliers as well, should take particular note of the following paragraph:

> [51] As a general proposition we note that whenever two electric systems with generating capacity undertake to interconnect and operate in parallel it is necessary for them to consider the nature of their respective electrical resources and individual system utility responsibilities, both as a means of evaluating the particular services to be rendered between the connecting systems and in order to ensure that appropriate compensation is afforded, either through service exchanges or financial payments. Marked disparities between two (or more) systems in the reliance placed upon the network should be reflected in the terms and conditions of the interconnection ar-

rangement through appropriate provisions. Each participant should bear its proportionate share of that responsibility. In our judgment, a prerequisite to viable and effective interconnected operations among all electric systems is an equitable sharing of the responsibilities of interconnected operation. Each participant should bear its proportionate share of that responsibility. In doing so, each interconnecting system will meet its utility responsibilities and there will be no economic penalties for being the last one on the interconnected network. (At p. 1233.)

11. Our purpose, then, is to provide assistance to Elbow Lake's power consumers under section 202(b), for they clearly require assistance. But our purpose is also to provide that assistance under terms that are fair to Otter Tail and its customers. Whether other communities will engage in similar ventures are matters which they must decide, but we believe their decisions should be made with knowledge of the experiences of Elbow Lake and Otter Tail.

12. It is in light of these concerns that we here require that Otter Tail permit Elbow Lake to interconnect with Otter Tail's facilities. In our opinion, this record shows that a long-term interconnection between Otter Tail and Elbow Lake, with Elbow Lake taking its full requirements from Otter Tail, would result in Elbow Lake's receiving power at the lowest cost. Figures which are set forth below assist in illustrating this conclusion. The several alternatives proposed by Otter Tail and [52] by the Missouri Basin Municipal Power Agency, and explored in the record, are either more expensive or legally unavailable. We agree with the Examiner that, as a matter of law we cannot compel Otter Tail to wheel Bureau of Recla-

mation power to Elbow Lake. *City of Paris, Kentucky v. Kentucky Utilities Company*, 41 FPC 45 (1969).

13. The question, then, is on what terms a long-term interconnection should be ordered. The Examiner concluded that if Elbow Lake were to take its full requirements from Otter Tail, it should pay to Otter Tail a rate based upon Otter Tail's fully-allocated cost for firm, wholesale service. In so concluding, the Examiner rejected a rate formula proposed by the Staff under which Elbow Lake would, first, pay capacity and energy charges which the Staff had derived from certain other Otter Tail service contracts (charges which the Examiner found would not recover Otter Tail's costs); and Elbow Lake would then, secondly, receive certain credits. The Staff's proposed credits were three: a "capacity credit" each month of 1/12 of Elbow Lake's annual payment of principal and interest on its existing generating plant; a credit relating to Elbow Lake's expenses in connection with installing interconnection facilities that exceed Otter Tail's usual requirements; and finally, a credit to compensate Elbow Lake for its actual costs for generating, if Otter Tail's service were interrupted, or if Otter Tail were to request Elbow Lake power.

14. We agree with the Examiner that the capacity and energy charges to be paid by Elbow Lake to Otter Tail should be based upon Otter Tail's fully-allocated cost. The capacity and energy charges proposed by the Staff were derived from other Otter Tail contracts which, because of the peculiarities surrounding their execution, cannot be accepted as a reasonable starting point here.

15. But we agree with the Staff that, on the basis of a full requirements arrangement, Elbow Lake should be given credit for its installed generating capacity. We are convinced that Otter Tail will, notwithstanding its strenuous arguments to

the contrary, in fact derive benefits from the interconnection. Otter Tail argues that it is not interested in, and in fact opposed to, acquiring any more diesel capacity, and that the availability to it of Elbow Lake's diesels will constitute [53] a burden upon it, and not a help. We understand what Otter Tail is saying, but our judgment differs. Given Otter Tail's commitments to the Upper Mississippi Valley Power Pool, Otter Tail could, under a full requirements arrangement with Elbow Lake, gain readily demonstrable benefits, in addition to the obvious benefit of acquiring an additional firm customer to be served at demand and energy rates designed to provide a full rate of return. In reporting its loads to the power pool, Otter Tail would be required to add Elbow Lake's peak load, about 1271 KW's, to its own peak load. But in reporting its resources, it should be able to add Elbow Lake's 2500 KW, if the pool provisions are interpreted and applied in the same manner as they have been to Otter Tail's own generating resources. Inasmuch as Otter Tail is required to carry only 12 percent reserve capacity for power pool purposes, the gain in generating capacity to Otter Tail is both clear and considerable. We quite understand that small diesel units do not generally represent an economical method of producing power for large companies, but they do have a usefulness as standby units. We believe that usefulness must be recognized in the rate Elbow Lake would pay to Otter Tail.

16. We thus adopt the Examiner's full cost rate, along with the Staff's proposed capacity credit. In so doing, we believe that we do not run afoul of the proscription in section 202(b) against the forced enlargement of generating facilities. We are not requiring Otter Tail to buy Elbow Lake's machines; we are instead prescribing the "terms and conditions of the arrangement to be made between the persons affected by [the

interconnection] order," as section 202(b) expressly permits us to do. One of the terms we here provide is the rate to be paid, and for the reasons above stated, that rate should reflect Otter Tail's gain in generating capacity arising from the interconnection.

17. We do not adopt the second Staff proposed credit. We instead will require that if a long-term, full-requirements arrangement is made, and if Otter Tail insists upon a circuit breaker at the point of interconnection, Otter Tail must pay for the circuit breaker and maintain it. The record shows that Otter Tail does not usually require a circuit breaker if continuous service is offered. If Otter Tail requires one in this case, it should pay for it.

[54] 18. We do adopt the third proposed credit, to compensate Elbow Lake for its actual costs for generating if Otter Tail's service is interrupted, or if Otter Tail requests Elbow Lake power.

19. On the basis of the figures contained in or derived from the record, the foregoing long-term, full requirements arrangement would cost Elbow Lake $105,000 annually. That amount, because of the inclusion of the capacity credit, is less than Elbow Lake would pay under the Examiner's Decision. It is also less than Elbow Lake would pay if it were to refrain from interconnecting and instead bought a 500 KW peaking unit. It is more, by $12,000 per year, than Elbow Lake would pay under the Staff proposal, viz:

[55]

| | *Examiner's Decision, Full Requirements* | *Self Generation* | *Staff Method Per Record* | *Staff Method Using Full Cost Rate* |
|---|---|---|---|---|
| ost of Purchased Power | $ 89,000 | $ 76,000[c] | $48,000[d] | $ 60,000[d] |
| nterconnection Cost | 6,000 | — | 6,000 | 6,000 |
| tandby Labor | — | — | 10,000 | 10,000 |
| ixed Charge on Elbow Lake's Generating Units | 29,000[a] | 29,000 | 29,000 | 29,000 |
| 00 KW Peaking Unit | — | 6,000[b] | — | — |
| Total costs to Elbow Lake | $124,000 | $111,000 | $93,000 | $105,000 |

[a] Should be reduced by carrying charge on the salvage value of the generating units.
[b] Estimated by the Commission to be the carrying charges on a new KW unit costing $70,000.
[c] Operating costs.
[d] Net of capacity credit. Operating costs incurred by Elbow Lake would also be deducted but would then have to be added separately so that totals would not change.

[56] 20. Because the foregoing full requirements arrangement seems to us the most satisfactory solution to Elbow Lake's bulk power supply needs, we think it unnecessary to provide to Elbow Lake the option of a partial requirements arrangement.[1] We could not do so, in any event, on the basis of this record. The Examiner proposed that if Elbow Lake chooses an interconnection on a partial requirements basis, then Elbow Lake would pay the same rates to Otter Tail as it would pay for full requirements service—i.e., rates based upon Otter Tail's fully-allocated cost for firm, wholesale service. Such a rate would, we believe, almost certainly be unreasonably and prohibitively high. More importantly, partial

[1] The term "partial requirements" is used herein to mean any service other than full requirements service.

requirements service would not meet Elbow Lake's needs as fully as the full requirements service we have outlined. We thus do not provide for it here.

21. The third option, of continued isolated operation by Elbow Lake, requires no elaboration from us. Elbow Lake is, of course, free to adopt it, but we think it clear that it does not represent the wisest course, either from the point of view of economics or reliability of service.

22. Otter Tail has sought oral argument. We think it unnecessary, for the case has been very fully briefed.

*The Commission further finds:*

(1) On and after December 1967 there has existed a shortage of facilities for supplying electric power in bulk to the distribution system owned and operated by the Village of Elbow Lake. The results are a shortage of installed reserves and a failure of the system to meet an adequate standard of reliability for firm power supply and other uses.

(2) Otter Tail is a public utility within the meaning of Part II of the Federal Power Act.

[57] (3) Elbow Lake is a "person" within the meaning of section 202(b) of the Federal Power Act.

(4) It is necessary and appropriate for purposes of the Federal Power Act, particularly section 202(b) thereof, and it is in the public interest, that the Commission direct Otter Tail to permit physical connection of its transmission facilities with the facilities of Elbow Lake at a point on the Otter Tail 41.6 kv transmission line, approximately 1.4 miles directly east of the present location of Elbow Lake's generating plant, in order to permit Otter Tail to sell to and exchange energy with Elbow Lake upon the terms and conditions ordered below. Such sale and exchange of energy will not place any undue burden upon Otter Tail, nor require Otter Tail to enlarge its

generating facilities for such purpose, nor impair its ability to render adequate service to its customers.

(5) Such physical connection should include the equipment necessary for a 2500 kva interconnection. Unless otherwise provided by written agreement of Otter Tail and Elbow Lake, the facilities for such physical connection should conform substantially with the facilities described in Exhibit 29. The Village of Elbow Lake should install and pay for the facilities necessary for interconnection with the Otter Tail 41.6 kv transmission line.

(6) Elbow Lake should own and service the necessary facilities for interconnection and its termination facilities on the Otter Tail system. If Elbow Lake elects to take its full requirements from Otter Tail, Otter Tail may at its option install a circuit breaker at the 41.6 kv interconnection point. In that event, Otter Tail should pay for the installation and maintenance of such circuit breaker.

(7) Elbow Lake should construct the interconnection facilities within a reasonable time.

(8) Unless and until modified by law, if Elbow Lake elects to take its full energy requirements from Otter Tail, then the rate paid to Otter Tail should be based upon Otter Tail's fully-allocated cost of firm, wholesale service, less a credit to reflect the interest plus principal costs of [58] Elbow Lake's generating plant, and less a further credit to reflect Elbow Lake's operation of its own units, if such operation is undertaken pursuant to Otter Tail's request, for which reasonable notice shall be required, or if it is required in the event that Otter Tail's service is interrupted. Elbow Lake should, at least once annually, and at its expense, demonstrate the capacity of its

generators in the presence of Otter Tail's duly authorized representative.

*The Commission orders:*

(A) The Otter Tail Power Company shall permit the establishment of a physical connection of its transmission facilities with the facilities of Elbow Lake. Such physical connection shall be established on the transmission system of Otter Tail at a point on the Otter Tail 41.6 kv transmission line approximately 1.4 miles directly east of the present location of Elbow Lake's generating plant. Such physical connection shall include the equipment necessary for a 2,500 kva interconnection. Unless otherwise provided by written agreement of Otter Tail and Elbow Lake, the facilities for such physical connection shall conform substantially with the facilities described in Exhibit 29. The Village of Elbow Lake shall install and pay for the facilities necessary for interconnection with the Otter Tail 41.6 kv transmission line. Elbow Lake shall own and service the necessary facilities for interconnection and termination on the Otter Tail system.

(B) If Elbow Lake elects to take its full energy requirements from Otter Tail, the interconnection will be operated in a closed position and, at its option, Otter Tail may install a circuit breaker at the 41.6 kv interconnection point; and Otter Tail shall pay for the installation and maintenance of such circuit breaker, if it should be installed.

(C) If Elbow Lake elects to take its full energy requirements from Otter Tail, then the terms and conditions of the sale of electric energy following the effective date of the interconnection, and thereafter, shall be as follows, unless and until modified by a rate schedule filing completed in accordance

with Part 35 of the Commission's Regulations under the Federal Power Act, or modified by Commission order:

[59] (1) Capacity Charge: The capacity charge shall be $46.97 per year per kw of peak demand, to be billed in 12 equal monthly installments. "Peak demand" shall be the greatest rate at which energy is used by the load served by Elbow Lake during any interval of 15 consecutive minutes during the annual period ended with the June billing period preceding, plus a load growth factor of seven percent of such demand; provided that when Elbow Lake's actual peak demand exceeds or is less than the estimated value, appropriate settlements to reflect differences between the demand so estimated and the actual peak demand shall be made by July 15 of each year.

(2) Energy Charge: The energy charge shall be 0.6073 cent per kwh for all kwh per month.

(3) Capacity Credit: Otter Tail shall credit Elbow Lake's billing each month with one-twelfth of the annual interest plus principal costs of Elbow Lake's generating plant, for each month in which Elbow Lake's existing two diesel generators are in operable condition. For any month in which either generator is not operable, the credit shall be multiplied by one-half the ratio of the sum of the days that each generator was operable to the total number of days in the month.

(4) Energy Credit: Upon reasonable notice, Otter Tail may request Elbow Lake to generate energy at a rate within the continuous (1136 kw) and two-hour overload (1250 kw) ratings of the diesel units. Elbow Lake may also generate energy if Otter Tail's service is interrupted. In either case, actual costs incurred by Elbow Lake will

be deducted from its monthly bill during the month in which the expenses are incurred.

(5) Demonstration of Generating Capacity: Elbow Lake shall demonstrate the generating capacity of its generators within one month of the signing of the interconnection contract, in the presence of Otter Tail's duly authorized representative. If the demonstrated capacity differs from the 1136 kw continuous rating and the 1250 kw two-hour overload rating referred to in paragraph (4) hereof, [60] then the capacity credit of paragraph (3) hereof shall be appropriately adjusted. The adjusted ratings shall remain in effect, with the adjusted capacity credit, until the next demonstration of capacity. Elbow Lake shall bear the cost of the first demonstration, and of annual demonstrations thereafter. Capacity demonstrations made more often than once a year shall be paid for by the party requesting such demonstration.

(D) Elbow Lake shall construct the interconnection facilities referred to herein within a reasonable time.

(E) Within 30 days from the date of issuance of this order, Otter Tail shall submit to the Commission for consideration a proposed rate schedule reflecting the terms and conditions of an interconnection for full requirements service to Elbow Lake, as set forth in this order.

(F) Otter Tail shall report to the Commission the date of commencement of service provided for herein, within 30 days following the commencement of such service.

(G) Because the interconnection and wholesale sale of energy ordered herein may be desired by Elbow Lake only until such time as it can obtain Bureau of Reclamation power,

a notice of termination of at least 90 days by Elbow Lake to Otter Tail is hereby required.

(H) The Decision of the Presiding Examiner on January 14, 1971, is adopted as the decision of the Commission, to the extent not inconsistent herewith.

(I) Upon compliance by Otter Tail and Elbow Lake with the foregoing paragraphs of this order, this proceeding shall be terminated.

[61] (J) All exceptions are denied.

(K) Oral argument is denied.

By the Commission.

(Seal)

KENNETH F. PLUMB,
Secretary

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[62] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
SIXTH DIVISION
Civil Action No. 6-69-139

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UNITED STATES OF AMERICA,

*Plaintiff,*

v.

OTTER TAIL POWER COMPANY,

*Defendant.*

---

NOTICE OF HEARING ON THE
FOREGOING MOTIONS

To: Kenneth C. Anderson, William L. Jaeger, and Barry F. McNeil, Attorneys, United States Department of Justice, Attorneys for the Plaintiff, and to the said Plaintiff:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that the foregoing Motions, and each of them, will be presented to the Court before the Honorable Edward J. Devitt, Chief Judge of the above named Court, at the Court Room in the Federal Courts Building in the City of St. Paul, Minnesota, on the 8th day of November, 1971, at eleven o'clock A.M., or as soon thereafter as counsel can be heard, or at such other time and place as may be determined by the Court.

Dated October 27, 1971.

Respectfully,
CYRUS A. FIELD and
DAVID F. LUNDEEN
of the firm of
FIELD, ARVESEN, DONOHO,
LUNDEEN & HOFF
Fergus Falls, Minnesota
Attorneys for Defendant

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

(Title Omitted in Printing)

ORDER

The above matter came on to be heard before the Honorable Edward J. Devitt, Chief Judge of the above Court, on the 8th day of November, 1971, on the Alternative Motions made by the defendant for a new trial or for amended and/or additional Findings of Fact and for amended and/or additional Conclusions of Law, and to amend the Judgment accordingly. Kenneth C. Anderson appeared as attorney for the plaintiff, and Cyrus A. Field and David F. Lundeen appeared as attorneys for the defendant. The Court having reviewed the Briefs submitted and heard arguments of counsel, now makes the following Order:

IT IS HEREBY ORDERED, that the said Motions made by the defendant be, and each of same, are hereby denied, except that the Judgment shall be amended as hereinafter provided.

IT IS FURTHER ORDERED, that the Judgment entered and filed herein on October 22, 1971, be amended by inserting one new paragraph to read as follows:

"V.

"The defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service or wheeling service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission."

The above additional paragraph shall be inserted after the present paragraph IV, and bear the number V as above stated, and the succeeding paragraphs shall then be changed accordingly and bear the respective numbers VI and VII.

An Amended Judgment shall be entered accordingly.

Dated November 10, 1971.

By the Court,
EDWARD J. DEVITT
Chief Judge
United States District Court
District of Minnesota

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION
Civil Action No. 6-69-139

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

OTTER TAIL POWER COMPANY,

*Defendant.*

## AMENDED JUDGMENT

This case having come on to be heard, trial having been had and the Court having considered the evidence and briefs, and having issued a Memorandum and Order dated September 9, 1971, and the Court having issued an Order Amending the Judgment as herein provided, it is hereby

ORDERED, ADJUDGED, and DECREED that:

I.

This Court has jurisdiction of the subject matter of the action and the parties hereto under Section 4 of the Act of Congress of July 2, 1890, as amended, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (15 U.S.C. Sec. 4), commonly known as the Sherman Act.

II.

Defendant has attempted to monopolize and has monopolized interstate trade and commerce in the retail distribution of electric power in cities and towns located in its service area, in violation of Section 2 of the Sherman Act.

III.

The provisions of this Judgment applicable to the Defendant shall also apply to each of its officers, directors, agents and employees and to each of its subsidiaries, successors and assigns, and all persons, firms and corporations acting in its behalf or under its direction and control, and to all other persons in active concert or participation with any of them who receive actual notice of this Judgment by personal service or otherwise.

IV.

Defendant is enjoined and restrained from:

(A) Refusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in any area serviced by Defendant;

(B) Refusing to wheel (transmit) electric power over its transmission lines from other electric power suppliers to existing or proposed municipal electric power systems in cities and towns located in any area serviced by Defendant;

(C) Instituting, supporting or engaging in litigation, directly or indirectly, against cities and towns, and officials thereof, which have voted to establish municipal electric power systems, for the purpose of delaying, preventing, or interfering with establishment of a municipal electric power system;

(D) Entering into, enforcing or claiming any rights under any contract, agreement or understanding which prohibits the use of Otter Tail's transmission lines to wheel (transmit) electric power from other electric power suppliers to existing or proposed municipal electric power systems;

(E) Entering into, enforcing, or claiming any rights under any contract, agreement or understanding which limits, allocates, restricts, divides or assigns the customers to whom,

or the markets or territories in which, defendant or any other electric power supplier may sell electric power.

V.

The Defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service or wheeling service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission.

VI.

For the purpose of determining or securing compliance with this Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division given to defendant at its principal office, be permitted, subject to any legally recognized privilege:

(A) Access during the office hours of defendant to all contracts, agreements, correspondence, memoranda, and other business records and documents in the possession or control of defendant relating to any of the matters contained in this Judgment; and

(B) Subject to the reasonable convenience of defendant and without restraint or interference from it, to interview the officers and employees of defendant, who may have counsel present, regarding any such matters.

Upon such written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit written reports relating to any of the matters contained in this Judgment as may be requested.

No information obtained by the means provided in this Section VI shall be divulged by any representatives of the Department of Justice to any person other than a duly autho-

rized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Judgment, or as otherwise required by law.

VII.

Jurisdiction is retained for the purpose of enabling any of the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Dated November 10, 1971.

EDWARD J. DEVITT
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
SIXTH DIVISION

(Title Omitted in Printing)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given, that Otter Tail Power Company, the defendant above named, hereby appeals to the Supreme Court of the United States from the Amended Judgment entered in this action on November 10, 1971.

This appeal is taken pursuant to 15 U.S.C.A. § 29.

Dated: December 7, 1971.

CYRUS A. FIELD
DAVID F. LUNDEEN
Fergus Falls National
Bank Building
Fergus Falls, Minnesota 56537
MILTON HANDLER
MICHAEL D. BLECHMAN
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
Attorneys for Otter Tail
Power Company

(Filed in the U. S. District Court, December 7, 1971.)

## PROOF OF SERVICE

I, CYRUS A. FIELD, one of the attorneys for Otter Tail Power Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 7th day of December, 1971, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States, as follows:

On the United States of America, the appellee, by mailing two copies thereof in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, United States Department of Justice, Washington, D. C. 20530; and by mailing two copies thereof, in a duly addressed envelope, with air mail postage prepaid, to Richard W. McLaren, Assistant Attorney General, Antitrust Division, United States Department of Justice, Washington, D. C. 20530.

All parties required to be served have been served.

CYRUS A. FIELD
Fergus Falls National
Bank Building
Fergus Falls, Minnesota 56537
Attorney for Otter Tail
Power Company

[T. I, 1]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

(Title Omitted in Printing)

The above-entitled matter came on for trial before the Honorable Edward J. Devitt, Chief Judge of the above-entitled court, at St. Paul, Minnesota, commencing at 10:00 o'clock a.m. June 1, 1971.

(Appearances Omitted in Printing)

* * * * *

[T. I, 2] The Court: Good morning, gentlemen. Well, I suppose we better start.

Mr. Anderson: May it please the Court, I first would like to introduce my associates here. This is Mr. Jaeger, William Jaeger. And this is Barry McNeil.

The Court: Barry McNeil?

Mr. Anderson: Yes.

I have prepared some very brief introductory remarks which basically are to give you an introduction as to just what it is we have here at trial. At this juncture I won't make any attempt to describe the facts or discuss the law concerning the case. We feel that our pre-trial brief and reply brief sets forth in detail both the facts as we see them as well as the legal basis upon which the case is premised.

The thrust of our case in a nutshell is that Otter Tail presently enjoys a monopoly in the retail distribution of electric power in towns in its service area generally and has a monop-

oly position in each of the towns it serves at retail; and also that Otter Tail has employed a variety of tactics to defeat efforts by towns it serves at retail to establish a municipal electric system, [T. I, 3] i.e. refusals to wheel, refusals to sell power at wholesale and litigation, all of which has served to preserve and maintain this monopoly position.

Now, getting to the outline of our direct case. As we see it, our case is basically a documentary case. Most of our witnesses are here primarily to authenticate documents, not to give testimony.

Their direct examination is going to be very short. We have three witnesses who generally fall in the category of more lengthy witnesses, Mr. Trommershausen, Mr. Muller and Mr. Nelson. Mr. Muller, as I will explain later, was unable to be here for the trial, and by pre-arrangement between Mr. Field and myself, we deposed him last week, three days of depositions, and by having use of the deposition approach, we have saved three trial days on that score.

Our case can be divided into several parts.

The first part has to do—and this is not going to be the order of presentation—the first part has to do with Otter Tail's position of dominance in transmission. The testimony of Mr. Trommerhausen is principally directed to this issue. We are also going to introduce maps, transmission [T. I, 4] agreements to which Otter Tail is a party, and other documents showing how the agreements operate in order to demonstrate Otter Tail's position of dominance in transmission.

The second part of the case concerns a description of the efforts by the towns of Colman, Aurora, Elbow Lake and Hankinson, principally, and several other towns to establish municipal power systems.

Now, here we start with the premise that the facts as to what occurred in these towns with reference to the effort to establish a municipal power system are not in dispute. Efforts have been made to handle these facts through stipulations, and we did succeed in agreeing upon several general statements of fact.

However, we feel it is necessary to flush out the facts somewhat. In order to expedite the trial, and because of the uncontested nature of the bulk of this evidence, we have decided to utilize contemporaneously written documents to trace the chronology of events in the towns in lieu of oral testimony.

We have four witnesses from the towns, Mr. Woytassek from Hankinson, Mr. Martinson [T. I, 5] from Elbow Lake, Mr. Lewis from Colman and Mrs. Waples from Aurora.

Our direct examination of them will be confined to the authentication of minutes of town meetings, a few other documents, and some brief substantive testimony on points not contained in the documents. In general, the witnesses will not be asked questions about the documents. We anticipate, in short, that the direct examination of these witnesses will consume very little trial time.

Now, witnesses Holten, Danforth and Hickerson will testify very briefly about the sale of municipal electric revenue bonds, with emphasis upon the need for a no-litigation certificate and the need for an assured source of power, including delivery thereof, in order to sell the bonds. This has reference to the use of litigation by Otter Tail to frustrate the sale of bonds, thereby delaying the establishment of a municipal electric system. These witnesses will also be asked to authenticate a few documents, and again, as we see it, their testimony will be very brief on direct.

Witnesses Bartel and Belinsky will be presented primarily to authenticate several documents relating to RSR coopera-tives' unsuccessful [T. I, 6] effort to deliver power to Hankin-son. There will be very little substantive testimony from them.

Witness Spethman of Northern States Power Company will confine himself to the authentication of a small number of documents relating to NSP's decision not to supply power to municipal systems in towns served by Otter Tail.

Witness Perino will authenticate documents relating to Runestone Electric Coop's inability to wheel power to Elbow Lake due to contractual inhibitions in the Otter Tail-CPA contract. Here is substantive testimony which will be very brief.

Witness Grahl will briefly describe Basin Electric Power Cooperative and how it fits into the bulk power supply picture in North Dakota. He will authenticate several documents con-cerning Basin's unsuccessful effort to arrange delivery of power to towns considering municipal power systems. His direct testimony will be brief.

Witness Loren Zingmark of East River Electric Coop will authenticate a few documents and give brief substantive testi-mony.

Witness Mohlman will not be called as a witness.

In sum, the facts concerning the [T. I, 7] four principal towns will be presented almost entirely via documents.

We also intend to offer, without witnesses, documents con-cerning municipal agitation occurring in the recent past in Finley and Velva.

We also intend to offer, without witnesses, documents show-ing municipal agitation which occurred prior to the mid 1950's. The purpose here is to show the consistent pattern of corporate conduct by Otter Tail Power to frustrate the estab-

lishment of municipal power and to show that this corporate policy existed and was pursued long before the Bureau of Reclamation began its Missouri Basin project operations during the early 1950's and before REA coops were much of a factor in the power picture in this area.

We also intend to offer various documents which generally fall into the category of campaign or publicity material which was used to influence opinion concerning the advisability of establishing municipal power systems. We will offer documents reflecting both sides of the debate. We will offer this type of evidence in order to have a full picture of the sequence of events in the towns where agitation occurred.

[T. I, 8] We do not take the position that any illegality attaches to Otter Tail's participation in this campaign activity. However, such documents are necessary for understanding of what occurred in the towns. They also show, insofar as Otter Tail Power is concerned, that the municipal agitation prompted Otter Tail to make offers of various improvements in order to persuade the towns to remain Otter Tail retail towns and we consider this to be an important byproduct of the competition between Otter Tail and the proposed municipal system.

Finally, Otter Tail stresses the importance to it of due process, which is understandable. We submit that these documents show that Otter Tail had a full opportunity to present its case to the towns, which is what due process is all about.

Finally, we will offer documents reflecting the litigation which occurred in several towns at the instance of Otter Tail. We take the position that such evidence is admissible to show yet another method by which Otter Tail Power sought to maintain and preserve its monopoly. In Colman and Aurora, where Otter Tail Power did not have dominance in transmission so

as to prevent the towns from arranging delivery of power, litigation was the principal tool used by Otter Tail Power.

We also take the position that [T. I, 9] litigation can be misused by a monopolist, and where a monopolist utilizes litigation primarily to defeat competition, a violation of law occurs.

It is true that most of the cases we cite in our brief are patent cases, but Otter Tail is a monopolist, and is in a position equivalent to that enjoyed by one who has a patent monopoly.

Now, the threat to Otter Tail represented by the Bureau of Reclamation power in our judgment is grossly exaggerated.

Otter Tail basically does not deny that it combated municipal agitation in any way it could, including refusals to wheel or sell at wholesale and through litigation, but it insists that it was and still is necessary for it to do so in order to prevent the erosion of its system.

In effect, Otter Tail contends that, should the government prevail in this case, towns that it presently serves at retail will abandon Otter Tail in favor of obtaining cheap power from the Bureau of Reclamation.

We have two answers to this. First, it is clear that the law does not permit the use of improper means in order to stay in business. Defendants in antitrust cases typically assert that resort to illegal conduct is essential to their survival, and courts have consistently [T. I, 10] given no weight to such arguments.

Second, it is our contention that the threat to Otter Tail Power's survival represented by the Bureau of Reclamation is grossly overstated. Witness Fred Muller, the Bureau of Reclamation man in charge of power marketing in the Otter Tail area is the witness who makes this point. As I indicated, we

have already taken his testimony by deposition. Mr. Muller's testimony shows that in our opinion, not only does the Bureau of Reclamation not have any power available through 1977 for towns not presently operating municipal systems, but in the post-1977 period, the Bureau of Reclamation will very likely not be able to meet existing customers post-1977 incremental load growth, let alone be able to serve newly established municipal systems.

In short, in our view there is little realistic threat in the foreseeable future from the Bureau of Reclamation to Otter Tail.

Now, witness Graham of the Bureau of Reclamation may not be called as a witness. We haven't made a final decision on this yet, but it is possible we will not call him at all.

[T. I, 11] Dr. James Nelson, our economist, is basically a rebuttal witness. We did not see the need for an economist in our direct case, but we had retained Dr. Nelson to review the exhibits which defendant will introduce through Dr. Morton. Since we aren't entirely sure what Dr. Morton's testimony will be like, we can't say at this point whether Dr. Nelson will actually be used. If he is used it will be in rebuttal and his testimony on direct will be quite limited.

In order to expedite the trial more, we will offer in their entirety the depositions of Messrs. Hartl, Nye, Seashore, Nygaard and Brewer. This will obviate the need for us to call them as witnesses and will considerably shorten our cross-examination of Mr. Hartl and Mr. Nye.

We anticipate our direct case will be largely completed by the end of this week with only Zingmark and Trommershausen left for the early part of next week.

As the first order of business today I would like to offer a series of documents.

The Court: Maybe we should afford Mr. Field an opportunity to give us a bird's-eye view as you have.

Mr. Anderson: Sure.

The Court: Mr. Field, do you want to [T. I, 12] give us a foreview?

Mr. Field: May it please Your Honor, counsel:

A bird's-eye view as I can give it to the Court and counsel, after listening to the prepared remarks of Mr. Anderson, is about as follows:

We have spent, both sides here, have spent considerable effort in attempting to and actually arriving at stipulations covering the basic—a good many of the basic facts both as to foundation for exhibits and also as to factual material that can be offered by either party.

Having gone through that effort and made some accomplishments in that direction which are documented by what's in the file on Your Honor's desk, I presume, we are still faced now with a voluminous set of documents which are proposed to be offered as exhibits. I don't know how many are left after some screening, but they numbered something around 600 GX, that's Government Exhibit, I guess it stands for, proposed exhibits which we have been analyzing and which will be the subject of the offer counsel just mentioned, and many of the documents that he says are proposed to be offered.

I would like to illustrate that practical situation, and I realize my remarks being offhand [T. I, 13] here in response to the prepared remarks of Mr. Anderson may not be complete, but I will try to cover the four corners as best I can.

The last stipulation we entered into was April 26, 1971 stipulation and perhaps I can illustrate my thoughts by referring briefly to the contents of the stipulations with reference to one town. Somewhat similar stipulations occur as to each

one of what was hopefully called the five major towns that some of our pretrial conferences in which we were zeroed in on in trying to arrive at these stipulations.

This is Elbow Lake. Here is what we have stipulated to as far as being available for either side to offer. I think these are ultimate facts that render unnecessary the need for voluminous documentation, whether they be called flushing out the facts or whatever, as far as evidence in the case is concerned, otherwise we have been wasting our time trying to arrive at these stipulations.

All right.

"Stipulations relative to Elbow Lake, Minnesota.

"1. Otter Tail has served Elbow Lake, Minnesota, and its inhabitants with retail electric service since about 1913.

"2. Otter Tail's franchise from the Village of Elbow Lake," I will abbreviate some for [T. I, 14] purposes of saving time, "expired in 1960 and the Village of Elbow Lake declined to renew Otter Tail's franchise * * *

"3. Interest had developed in the Village of Elbow Lake in exploring the possibility of establishing a municipal electric system.

"4. Some of the citizens of the Village of Elbow Lake were in favor of continuing with Otter Tail's electric service and were opposed to the establishment of a municipal electric system; and some of the citizens of Elbow Lake were in favor of establishing a municipal electric system.

"5. On or about," a certain date, "the village council retained K. B. MacKichan & Associates to prepare an engineering feasibility study," and such a study was submitted on a certain date. I am abbreviating, of course.

"6. An election was held in the Village of Elbow Lake on January 23, 1962 at which the voters approved the establish-

ment of the new municipal electric system." The question submitted on the ballot is quoted here, which I won't repeat orally.

"7. Before and after this election in Elbow Lake, a vigorous publicity campaign was waged between the proponents and opponents of the new municipal electric system. This campaign involved citizens of the Village of [T. I, 15] Elbow Lake on both sides of the controversy.

"8. Before and after this election in Elbow Lake, Otter Tail vigorously opposed the establishment of the new municipal electric system."

Then for the purposes of having the material available, identified and foundation admitted, we object to any of this campaign material on grounds I will mention in my remarks. There is listed in paragraph nine the campaign and publicity material on both sides of the controversy identifying the documents.

Just to give the Court some view of the extent of that type of document, these run through as far as Elbow Lake is concerned, oh, they are ads and flyers and publicity in the paper and vote "No" and vote "Yes" and so forth, various arguments on both sides.

"10. The Village of Elbow Lake constructed the new municipal electric system to furnish the retail electric service in Elbow Lake, the construction of the municipal system being completed in June of 1966, at which time Otter Tail was compelled to cease to provide retail electric service in Elbow Lake.

"11. The new municipal electric system in the Village of Elbow Lake secures its supply of electric power and energy from the newly constructed local electric generating plant in

Elbow Lake in accordance with [T. I, 16] the plan of the municipal electric system which was submitted to the voters.

"12. Prior to the construction of the new municipal electric system, and in 1964, the officials of Elbow Lake applied for and secured an allocation of firm power from the Bureau of Reclamation.

"13. On March 16, 1966, before the completion of the construction of the new municipal electric system, the Village of Elbow Lake commenced a proceeding against Otter Tail before the Federal Power Commission," and this is identified in the pleadings in connection with which are in the files of this Court, in connection with some motions.

"14. The Village of Elbow Lake commenced a private antitrust action against Otter Tail in this Court," which is identified and the files are here.

Now, of course, the matter of proceeding before the Federal Power Commission and the antitrust case are peculiar to Elbow Lake and some of the other items will vary somewhat as to other towns. This stipulation makes a similar stipulation with reference to Hankinson, North Dakota; Colman, South Dakota; Aurora, South Dakota; Finley, North Dakota. Those are the five towns that we sort of thought at one time at least were the ones that were going to be concentrated on.

[T. I, 17] Now, it seems to us that with these basic factual stipulations available, that if we accomplished anything we don't need to document the history of the town.

They propose to offer franchises that expired. They propose to offer minutes of the council leading up to the establishment of the plant. They propose to offer campaign material for the elections and all of the multitudinous details that are the background of these ultimate facts. We have wasted our

time. We have accomplished nothing if this additional material is now going to be offered and received.

So much for the general picture as far as offering documents and/or testimony that does nothing more than show the buildup or background of the facts, the ultimate facts which are the important things which we were encouraged to and have worked on and have produced stipulations with reference to.

Now, there are certain areas, leaving that now and going to some other subject matters, there are certain areas of testimony that we object to on the merits of the testimony regardless wheher it comes from the stipulations, this background, or from witnesses or wherever it comes from. One is the campaign or publicity material involved in attempts on both sides to influence town officials or the electorate in making their decisions, either by publication [T. I, 18] or in the Council meetings or whatever upon the ground that the Supreme Court has held as clearly as anything, and I think admittedly so, in the Noerr and Pennington cases and related decisions, that efforts of that kind are immunized from antitrust attack, in fact, the cases go much farther than any factual material here.

The Noerr case involved what was said by the Supreme Court to represent, oh, misrepresentations and fraudulent devices and whatnot in an attempt to influence positions of public officials and even those were immunized because of the freedom's guaranteed by the Fifth Amendment and so forth, and we don't think that evidence is admissible under any guise.

They say they need to have it to either color or show some historical development of factual material which we have, as a matter of fact, basically already stipulated to. We said

there were people on both sides, that Otter Tail vigorously opposed, the opposition vigorously supported and so forth. Assuming they were admissible for any purpose they wouldn't do any more than show that except somebody's argument one way or the other on it.

Coming to another area of testimony that we think is inadmissible either on the merits or in the form in which it's being offered or going to be offered as [T. I, 19] we understand it, and that's litigation. Now, the right to resort to the courts to have one's rights determined, of course, is basically a freedom of this country that is recognized as belonging to everyone and to be preserved without impairment. There are some cases where litigation has been misused and the cases are in our briefs with reference to the implications antitrust-wise in those particular cases; and there has been some litigation in some of these towns that have threatened to oust Otter Tail and some cases have ousted Otter Tail from the retail service in those towns, and each case will have to be looked at if the evidence is going to be admitted in a complete way to understand what factual matters and legal issues were presented to the Court and determined. They say it's a misuse of the process of the courts and we will have to look at it and see what use was made of the process of the courts which will be an excursion into these various cases and it's a little hard to generalize, but let me say this at this point from the standpoint of an opening statement that here we have a company with an investment to serve a particular town with public utility retail service.

[T. I, 20] The threat is that that business is going to be destroyed and they are going to be ousted. The municipality has a right to go into the electric business under the statutes

by following certain procedures, and so forth, complying with the law.

Is a company or a citizen in that standing or in that status who has a stake in the business, in the property, taxpayer status, unable to go to the courts and have determined whether these proceedings are legal, whether they are being put out of business by illegal proceedings or not? What better basis is there to go to the courts to have rights determined, and if people with that type of interest are deprived of going to the courts to have the issues determined and the legality of the proceedings, who would be interested in raising these points?

Of course, there are many instances where local citizens have joined or also have been involved in this litigation, but I am just speaking from the standpoint of Otter Tail, and if we explore these instances of litigation, we will find that the basic issue in the case is whether, I think, in general, the proceedings to oust Otter Tail were conducted in accordance with law, and if we have not the right through a court to have that determined, if we are violating an antitrust law, by seeking to have those rights determined, I guess we will have to find it out, because it [T. I, 21] seems a basic right to go to the courts, and that should not be interfered with.

One other point in connection with the litigation and also some of the issues that counsel has mentioned and which have been listed in our exhibits, both from the standpoint of publicity or elections or in some cases litigation, they go back to the year 1, as far as Otter Tail is concerned. Some of them go back to the 1930's, 1940's and early '50's. The two main points in connection with those ancient activities, and I call them ancient anyway, occurrences, 1, the factual context in which any situation arose back in those years is so different from anything that is involved in this case that they would have no

material bearing, in any event, and if they are going to be introduced, we would have to go into that history and show what the situation was in each case back in those years.

Of course, there's been municipal agitation. Otter Tail has been subject to competition. Its having a monopoly is a facade of the plaintiff, as far as we are concerned. The fact they are subject to competition is evidenced by the fact that they have had this agitation to contend with, and to try to maintain their picture before the public and continue to serve in all proper ways and means for many years.

If they drag in these ancient [T. I, 22] affairs it will require considerable testimony to present to the court what the situation was.

Point two as to these old occurrences, and I refer to plaintiff's complaint, because we don't think they are admissible under the pleadings; plaintiff's complaint page 4, paragraph 11, which has the heading of "Offenses charged," I quote: "Beginning in or about 1955 and continuing thereafter, up to and including the date of filing of this complaint, defendant Otter Tail has attempted to monopolize and has monopolized," and so forth.

Well, we think that that does and was intended to and is certainly, as far as the issues in the case are concerned, it fixes a date which should be adhered to unless there is some amendment to the complaint, and at this stage that would be improper. Why the plaintiff picked out 1955, I don't know, except for the fact that that is the date of the Bureau-Otter Tail contract which is under attack in this case.

So we think these ancient affairs were ruled out by the plaintiff itself, and properly so. They are not relevant under any circumstances, as we see it.

Of course, I have not been able to and I should not attempt to outline our defense to all of these things. There are objections to the general picture as we start out here, but we do think there is going to be [T. I, 23] considerable controversy between us and objections to this mass of documentation which now becomes immaterial because the basic facts have been stipulated to or they are irrelevant for other reasons, and there will be quite a series of details to address ourselves to in combing out these things.

I was handed this morning a re-list of documents that we have just started to analyze.

I hope, Your Honor, my statement may be of some help to the Court in understanding where we are right now.

Mr. Anderson: May I respond very briefly, Your Honor?

We don't think that the stipulation we entered into is a futile act at all. As a matter of fact, as a result of having entered into that stipulation, we have very substantially reduced the number of exhibits we propose to introduce. We started out with about 10 or 11 files with documents. We have made, if I may be so immodest to say so, a herculean effort to really just pick those few documents that we need to tell our story. This listing that Mr. Field referred to is a list that we prepared of 294 exhibits. It has our exhibit number and a description of each document and identifying symbol which we placed on the document when we sent the documents to Mr. Field some time back. Most of the documents were sent in December.

[T. I, 24] Now, this group of 294 documents, which we propose to try to introduce without witnesses represents by our estimates about 85 percent of our documentary case. In fact, if we are able to get these documents in, our case will be largely finished. All we have to do is bring on a few witnesses to authenticate some documents and answer a very few number

of questions, and then we are finished, except as to Mr. Trommershausen. In short, the case has really been shrunk very considerably.

Now, I admit that a group of 300 exhibits may appear to be quite voluminous to the layman, perhaps, but in antitrust cases I have not seen one where we have been able to get away with just a few documents. It's the nature of the beast. We are not interested in presenting a lot of documents, in throwing in a lot of documents just for the fun of doing it. We do have to present what we think are the essential facts in the case.

For example, in the Elbow Lake stipulation, which Mr. Field read off, there is nothing in there at all about the efforts of Elbow Lake to secure an alternate source of supply. We have documents relating to that, and that is one of the key things in the case. We are not going to have any testimony about that. We are going to have documents only on it. Once those documents are in, that is finished.

If Your Honor would permit, I [T. I, 25] will show you what this list looks like. This is what I propose to do next in proceeding with the case, to start down this list of documents, giving the reporter a copy, and you will note a substantial number of the first 60 of them are documents that are basically contractual in nature. In fact, a good number of those documents are documents which Mr. Field sent us indicating he was interested in them. Perhaps he ought to make those joint exhibits.

The actual number of documents for each town is really quite limited. We have the basic set of minutes and documents reflecting the efforts to secure power, some documents about litigation, some documents about the campaign, and that's it, essentially.

The Court: Well, I guess I would be less than frank if I didn't observe that these opening observations cast a pall over the whole proceedings, as I see it, because it looks to me like we would be here ad finitum, ad nauseam and, in fact, all summer if we went on the way you each talk now.

As I see it, you claim, essentially, that Otter Tail refuses to wheel and they won't sell wholesale, and they say that's true. Basically, isn't that the issue?

Mr. Anderson: Basically, yes.

The Court: Well, then, what I must do is draw a conclusion from that, isn't it?

[T. I, 26] Mr. Anderson: Yes.

The Court: Why should we have all this other stuff here? There isn't, really, a factual dispute at all, is there?

Mr. Anderson: No, there isn't.

The Court: Why do you have to flush out anything? Haven't you said, "Otter Tail refuses to wheel," and Otter Tail says, "We do refuse to wheel." You say, "Otter Tail won't sell at wholesale," and they say, "We won't sell at wholesale."

Why do we need to do more than that? I have to draw a conclusion whether that means there is a violation of the antitrust laws.

Mr. Anderson: That is right.

The Court: Why do we need any witnesses of any of these five towns? Why do we need to go into that of ancient history? Isn't that going to occasion Mr. Field saying, "Well, now, that isn't quite the right twist to that thing." So he calls some witnesses and they get on and there are all kinds of documents, which really makes this a Federal, Federal, Federal case out of it, isn't that correct, when it isn't necessary?

Mr. Anderson: All we want to do here, Your Honor, is make a record which will permit us to write a brief which, in

a sense, parallels the pre-trial brief [T. I, 27] we wrote. Now, that pre-trial brief did not go into a lot of detail, did not embrace millions of minute details concerning what happened in each town. It really concerned itself with the ultimate facts in the towns.

Now, as we see it, we have to have at least a minimum number of documents reflecting the efforts by the towns, the contemporaneous documents showing what the towns asked for, and—

The Court: What is so sacred about a document? Why do you need a document? Haven't you re-stipulated to what the essential facts are?

Mr. Anderson: That is the problem, we have not. As you will—

The Court: What are you missing?

Mr. Anderson: Basically, what we are missing here are the documents reflecting the efforts by the towns to secure the source of power. We don't have that in the stipulation.

The Court: Haven't you stipulated that these outfits tried to get power somewhere?

[T. I, 28] Mr. Anderson: The stipulation, I don't think in Elbow Lake there even is a stipulation as to that, and since that is when—that's one of the key issues in the case, we have to have some documentation.

The Court: You mean Elbow Lake, for instance, tried to get power somewhere else and it couldn't get it?

Mr. Anderson: Right.

The Court: Do you stipulate to that? Is that true? Is that a fact issue we will have?

Mr. Field: I think in some respects there are fact issues.

The Court: You claim Elbow Lake didn't try to get power from somewhere else, Northern States or somewhere?

Mr. Field: Let me say it this way. They put in their own generating station, and then they tried to get an additional source of power, but what's available to them in being successful or unsuccessful in the long run would be subject to some dispute.

The Court: Is that true of the other four major towns too?

Mr. Field: No. No.

The Court: Then we do have one issue, we do have one fact issue that he has to prove according [T. I, 29] to his theory of the case?

Mr. Field: Colman and Aurora had cooperatives right in town or next to the town and they furnished the power from the beginning so they had no problem of source of power; and Hankinson might be involved in this factual dispute as to them trying to get a source of power. What was available to them or might be available to them would be in the realm of some factual dispute.

The Court: Okay. I will put in with you. You both say that's an issue. You claim Elbow Lake tried to get other power and couldn't do it and you deny that?

Mr. Field: I am not denying they tried but what I am saying is that their attempts and the power available to them is the subject of testimony. For instance, there is a potential of power from East River Electric Cooperative that's still hanging fire in Elbow Lake that they have tried, and just to say they tried and been unsuccessful isn't the whole story, and we need evidence on that and we haven't stipulated to that area of proof.

The Court: Okay. I agree. One issue.

What's the next one that you have to prove that isn't stipulated to?

Mr. Anderson: Well, we, of course, [T. I, 30] with respect to Colman and Aurora, want to show that their efforts to

establish a municipal system were frustrated by litigation and in those two towns that is the key fact.

The Court: Is there any dispute about what Otter Tail did about the litigation, whether they hired attorneys and an attorney's name was on the pleading or what they paid the attorneys? Is there any dispute about the facts?

Mr. Anderson: As far as I am concerned there really is not because the depositions we took of the Otter Tail employees reflect those facts as we see them.

The Court: Then do we need any witnesses about them?

Mr. Anderson: No. Your Honor, the point I am trying to make and perhaps didn't make very proper or very well is that we really don't need witnesses to establish any of these facts. All we need—

The Court: How many witnesses do you have lined up? You listed about 12, 15?

Mr. Anderson: Right.

The Court: Why do you have those witnesses then?

Mr. Anderson: To authenticate documents basically.

The Court: Do you doubt the [T. I, 31] authenticity of the documents he has to offer? Do you think they are spurious or something?

Mr. Field: Well, last week's deposition with Mr. Muller took care of the foundation at least for a good many of the documents. Any documents to which Otter Tail is a party either by writing them or contractee or a receipt, we have raised no question of foundation.

The Court: Does he need to call a witness to introduce documents?

Mr. Field: I don't know what's left without analyzing it.

Mr. Anderson: Well, this group, this listing of documents that we just gave you are documents that we need no witnesses

for. There is no argument about foundation with respect to any of those so far as I know.

The Court: Is that true?

Mr. Field: I was just handed it, but I assume it's true if counsel says so.

The Court: May we say Exhibits 1 through 294 of the Government may be received?

Mr. Field: No. No. The foundation is available.

The Court: You object to the materiality?

[T. I, 32] Mr. Field: Yes. And we have to do that singly and as we go through them.

Mr. Anderson: But I submit that—

The Court: Did you hear that? He said we have to do that singly. What it means is you are going to offer one and you are going to keep on until you get to 294 and we are going to have a little Donnybrook Farm here about each one of these 294 exhibits.

Mr. Anderson: If I may make an observation, Your Honor, I think you will find a substantial portion of the documents, for example, one through 84, for example, there ought not to be much argument about those.

The Court: What have you fellows been doing? Every few months we have been meeting and you tell me how well you are getting along, on three or four occasions, what have you accomplished?

Mr. Anderson: We have accomplished a great deal. I think that we can go through this list and put these documents in very quickly.

The Court: Let's try it.

Mr. Anderson: Now, the only problem we are going to have will be with respect to when we get to the towns, we are going to have to have a debate on the issues, on the objections

Mr. Field is going to raise concerning the campaign material, the litigation, and [T. I, 33] to the extent there is pre 1955 material, we are going to have to do that; but once we have gone through that exercise with respect to one town we will know what the rules are and then we will go through the other towns, you know, we are going to move through very quickly. Once we get the rulings on the first town then I submit things will go along very quickly one way or the other.

The Court: Let's try it out and see. What do you offer?

Mr. Anderson: I beg your pardon?

The Court: What do you offer?

Mr. Anderson: I will offer—

The Court: Do you want the original back?

Mr. Anderson: The originals are in the file. The first exhibit to be marked is GX-1, the partial stipulation of facts between the parties dated October 8, 1970.

The Court: Haven't these already been marked?

Mr. Anderson: Yes.

The Court: Absent objection that may be received.

Mr. Field: We have objections to certain parts of it.

[T. I, 34] The Court: All right. We will start from the beginning. I am waiting to hear those objections, Mr. Field.

Mr. Field: I am getting organized here.

The Court: Let's take a recess so you can get organized and you will be ready with your objections to the next 293 too, and maybe before noon we can get these in.

Mr. Field: I think I can handle the first one now. I will try.

The Court: All right. Go ahead.

Mr. Field: Whatever you say.

The Court: Go ahead.

Mr. Field: Now, this partial stipulation of facts have been marked Exhibit 1, Your Honor, and as you see is a voluminous document. It incorporates some answers to interrogatories and I will have to refer to paragraphs of it in order to state whether we do or do not have objections to it.

Paragraph one we have no objection to.

Paragraph two we have no objection to.

Paragraph three starts with reference to certain interrogatory answers and says at the outset that each and all of the facts stated in defendant's answers to plaintiff's interrogatories are admitted as far as foundation [T. I, 35] is concerned, but I understand you are offering only answers to interrogatories 2, 3, 5, 6 and 10, do I understand that correctly?

Mr. Anderson: Yes.

Mr. Field: I will say that we will be interested later in offering other answers that plaintiff isn't interested in offering but addressing ourselves to plaintiff's selection, answers to interrogatory number 2, we object to a part— Well, just a minute. Mr. Lundeen, my associate, called my attention to the fact that these two exhibits refer in some respects to the same material that—

I guess I had better ask you what are you offering, all of Exhibit 1? Exhibit 1 is a complete set—

Mr. Anderson: I might in order to expedite things, I will offer the entire answer to the interrogatory and that way you can—everything you want will go in and everything I want will go in and we will be done with it.

Mr. Field: What would happen to your second item then, GX-2 that you have labeled in your list?

Mr. Anderson: That will be a gap, I guess. We can substitute something else for it. If it would expedite things, I will

mark as GX No. 1 the entire [T. I, 36] answers submitted by the defendant to plaintiff's interrogatories.

Mr. Field: You will eliminate what you have called GX-2?

Mr. Anderson: Right.

Mr. Field: Very well. Then I will continue with my remarks, and we do have some objections to portions of answers to interrogatory No. 2.

And referring to paragraph 2A which is a list of towns in which there have been an election on a municipal plant issue or financing thereof—I forget what the interrogatory was, but it goes back quite a few years—and we object to those portions thereof that refer to the municipal plant election in Britton, South Dakota held on February 24, 1948; the municipal plant election held in Crookston, Minnesota on November 6, 1945; the municipal plant election held in Hankinson, North Dakota on May 19, 1947; two municipal system elections held in Milbank, South Dakota, one on August 1, 1951 and the other February 25, 1953; two municipal plant elections held in Minneota, Minnesota, one on November 22, 1949 and the other on February 1, 1950; two municipal plant elections held in Walhalla, North Dakota, one on July 22, 1949 at which two issues were submitted, and the other on May 4, 1951; and two municipal plant elections held in Wheaton, Minnesota, one on October 14, 1949 and the other on December 7, 1954; and we object to each of those [T. I, 37] portions the answers to interrogatory No. 2 separately upon the ground that each of said items is remote in point of time and involve facts and situations and context vitally different in and not material to any of the issues in this case and also as not being admissible under the pleadings.

Mr. Anderson: If I may interrupt for a moment. We anticipated that we would be confronted with an argument on

this background remoteness point and yesterday we prepared a brief on the point, Your Honor. If you would be willing to accept it, we do have a brief which contains our notion as to the extent it's proper to show background evidence to and in opposition to.

[T. I, 38] The Court: I am ready to rule. Are you all through with your arguments on number 1, GX-1?

Mr. Field: Of course, I have just been handed this document.

The Court: Well, we will take a recess for about 10 minutes, then.

(Recess taken.)

Mr. Field: I have done the best I can in reviewing this brief during the recess, Your Honor. It seems that with the background, subject to use in various contexts, is about like a lawyer asking a witness an immaterial question, it's always preliminary. Now we have got the background which seems to be bringing in most everything.

I think that an analysis of these cases will show that they are distinguished from the case we have at hand. Some of them involve the statute of limitations in connection with that case and others involve, from my recognition of the cases themselves, development of an international cartel like the Aluminum case, and so forth. We don't think they are authority for letting in this ancient, as I call it, these ancient illustrations or incidents in the Otter Tail case. Each town has a municipal problem, each town has an individual problem which has to be considered, [T. I, 39] handled the best that it can be handled at the time under the facts and circumstances that were present then, and I suppose if this goes in, we will have to go into what happened back there in those years. We don't think is it going to be helpful to the Court or that it is admissible.

I suppose I will have to suffice my argument with the remarks of this general nature at this time, Your Honor.

Mr. Anderson: If I may just make a very few brief observations, Your Honor, the first of which is that the Court need not be fearful that we are about ready to inundate the Court with a ton of material relating to background pre-1955 activities. We are not. We have what we consider to be a relatively small amount of such material. We don't try too many Section 2 cases. I think the last Section 2 monopolization case that the Division tried was the Grinnel case. There isn't an awful lot of law on the evidentiary points in Section 2 cases. But what there is shows that in every instance, the Court has considered it necessary and important to have before it at least in outline form some history of the particular company involved, some notion as to the movement of the industry of which the company is part.

I submit it is impossible to properly evaluate a Section 2 monopolization case without reference to at least some historical development.

[T. I, 40] We think it's important here to note that there has not been an immense amount of municipal agitation. There has been some. We think the Court ought to know how much there has been in the recent past. This interrogatory shows it, shows the result of it, shows in many cases that Otter Tail won. We think that is important for the Court to know.

In short, we don't have an immense amount of material. That which we do have we feel will be very helpful to the Court in getting, the particular towns that we are focusing on in this case, their experiences, in perspective, and that is the reason we are offering it.

In the Grinnel case, the government did not have a single live witness. We went through the actual same procedure that

I am trying to proceed with here today. We marked depositions and exhibits. The government rested its case in 10 minutes. I realize that we can't do that here today, but that is the approach we are trying to follow and trying to make this thing as short and as much to the point as we possibly can.

The Court: I am ready to rule on Exhibit Number 1. Have you stated all your objections?

Mr. Field: It's not Exhibit 1, Your Honor. It's part of Exhibit 1.

The Court: I will be glad to hear [T. I, 41] all objections to Exhibit 1, and then I will rule on it.

Mr. Field: Should I go on, then, with other portions of it?

The Court: All right.

Mr. Field: They relate to other matters.

The Court: All right.

Mr. Field: I suggest, in view of counsel's statement, that he offer all of the answers to the interrogatories; that the answers to the interrogatories themselves should be marked as an exhibit, because Exhibit 1 does not contain a repeat of all those answers.

Mr. Anderson: Yes. The confusion arises, Your Honor, because in our first stipulation, instead of incorporating into it the interrogatories, we put part of them in. I think that what we will do to clear anything up is mark as Exhibit Number 1 our interrogatories and mark as Exhibit Number 2 the entire answers to the interrogatories, and in that way we will clear up any question there is on the record as to what is in and what is out. Number 1 will be our interrogatories and number 2, GX-2 will be the entire answers by defendant to our interrogatories.

Mr. Field: Perhaps Exhibit 1-A would be more descriptive because they are related, but I don't care.

[T. I, 42] Mr. Anderson: Since we are losing an exhibit by withdrawing number 2, that way we will preserve the sequence and there won't be a gap.

Mr. Field: Should we select that document and have it marked then so we have the record clear, the official one in the file, the answers to the interrogatories?

Mr. Anderson: I don't have the official one here.

The Court: They may be in here, I think (indicating).

[T. I, 43] Mr. Anderson: Let the record show that the defendant's entire answers to plaintiff's interrogatories have been marked as GX Exhibit 2 and that plaintiff's interrogatories have been marked as GX Exhibit 2-A.

Mr. Field: I understand, Mr. Anderson, you are offering all of Exhibit 2 then?

Mr. Anderson: All of it, right.

(GX Exhibits 2 and 2-A offered in evidence.)

Mr. Field: My objections that I previously made refer to defendant's answers to interrogatories and would refer to part of paragraph 2A of Exhibit 2 now that we have that identified.

Now, we object to those portions of paragraph 2b of the answers to plaintiff's interrogatories which have now been identified as Exhibit 2 which refer to the towns of Dakota City, North Dakota; Georgetown, Minnesota; Sanish, North Dakota; Van Hook, North Dakota; White Spur, North Dakota; and Woodworth, North Dakota, which are objected to generally upon the grounds that the material with reference to each of said towns is immaterial to any issue in this case.

I might say, Your Honor, that these cases do not involve any instance of municipal agitation or municipal trouble such as we have been talking about. They [T. I, 44] do represent some towns that previously received retail service from Otter Tail

but no longer do, but for reasons that are unrelated to the problem we are discussing here. For example, some of them were inundated by the pond of the Garrison Dam and no longer exist, and some of them have involved towns that were sold to a cooperative, I believe, for reasons that were individual to the situation involved and are referred to in Mr. Hartl's deposition, I believe. I suppose it's harmless material but it just adds to a record nothing as far as any issues are concerned, they are just immaterial.

I might say that the towns that we have selected to object to are not all of the towns listed in 2b. There are other towns such as Aurora and Colman and Elbow Lake that we don't object to because obviously they are involved in the issues in the case.

Mr. Anderson: Your Honor, would it be appropriate for me to make a response as we go along as Mr. Field makes his objections to various parts?

The Court: As you wish.

Mr. Anderson: Very briefly the point of putting this information in is simply to show that of the nine towns which have discontinued receiving retail service from Otter Tail, only three left to set up their own municipal systems. The other six went, for other reasons [T. I, 45] which are very briefly described, I think in our stipulation of facts essentially, that's just the point of that, to show to the extent that there has been an erosion of nine towns, in six cases Otter Tail put up no opposition, in fact, acceded to it, just to put the record in some perspective.

Mr. Field: You set up a straw man and then knock it down. I mean there is no claim of erosion from those towns.

Well, to continue then if Your Honor wishes me to, we object to the receipt of the answer to interrogatory No. 3 of Ex-

hibit 2 which is a list of towns that have changed from municipal electric distribution to retail distribution by Otter Tail. There are six of them starting with Big Bend, North Dakota and ending with Wilton, Minnesota, upon the ground that that's immaterial to any issue in this case. Each case had its own situation as to why the town was interested in changing from their type of service to Otter Tail service and the explanations can be given, of course, and we just think it's immaterial and harmless, but it takes time and would take more time.

Mr. Anderson: Just briefly with respect to that, Your Honor, we are not drawing any inferences from this at all. What we are trying to do is to show that it's a two-way street. From time to time towns decide to sign up with Otter Tail for retail service. [T. I, 46] It isn't all one way or the other and this points that out. We are not interested in any of the reasons as to why that happened. We are not going to go into the reasons why that happened.

Mr. Field: Well, we will be interested in it because the reasons are entirely irrelevant to any point in the case to say you got some town and lost some towns and then you draw some conclusions. It's a two-way street isn't the answer to the question. It's not a two-way street unless they are similar situations and none of these are. That completes my statement with regard to that.

The defendant also objects to the answer to plaintiff's interrogatory No. 4 in Exhibit 2 which is a list of purchases of electric power by Otter Tail from the Bureau of Reclamation for the years 1950 to 1958 showing the volume of electric power purchased and the dollar amount therefor, it all being nonfirm power as stated in the answer. Actually there were no

purchases in the first years, the first purchase commencing in 1955 through 1968.

Now, the fact that Otter Tail purchased dump power from the Bureau is conceded as it was when needed or available, but we think the detail or even the fact therefor is just cluttering up the record with details that won't be helpful.

[T. I, 47] Mr. Anderson: Well, here again, Your Honor, this is just an effort on our part to provide a little background as to Otter Tail Power Company's operations, to point out that Otter Tail itself does buy power from the Bureau in rather considerable amounts. It's basically background information concerning the operations of the company which we feel is pertinent.

Mr. Field: Now, except for the portions that we have indicated in our objections, Your Honor, we have no objection to the receipt in evidence of the balance of Exhibits 1 and 2.

The Court: Have I heard everybody out on Exhibits 1 and 2?

Mr. Anderson: Yes.

The Court: They may be received.

(GX Exhibits 1, 2 and 2-A received in evidence.)

Mr. Anderson: I'm sorry, I didn't hear you?

The Court: I received 1 and 2.

Mr. Anderson: All right. Now, we come on our list to Exhibits 3 through 83. They are all contracts, all of whose which have alphabetical designations in parentheses, for example, 3 has Exhibit C, are documents which we received from Mr. Field in connection [T. I, 48] with a proposed stipulation concerning foundation of those documents and the other documents which we obtained generally from the files of the Federal Power Commission, and I think most of the documents,

if not all of those, have an indication on the document it came from the files of the FPC.

Now, it seems to me that we should be able to work out some expeditious way of putting these in.

The Court: Absent objection, they may be received.

Mr. Field: If Your Honor please, the only way I can go at this intelligently is the way we stipulated to them which isn't precisely the way you have done it here.

Mr. Anderson: Well, C through—

Mr. Field: May I finish my statement?

Mr. Anderson: I'm sorry.

Mr. Field: The second stipulation headed, "Additional Statement of Facts," dated December 10, 1970, and which is in the files of the Court and submitted with that, with contracts which were identified with the identification of Exhibit A through KK, inclusive, and that list was added to in the stipulation which has the heading, "Additional Stipulation of Facts, Supplement No. 1," which bears the date April 26, 1971, and continues on with identifications of Exhibits LL through TT.

[T. I, 49] Now, each and all of those contracts we have no objection to their being received in evidence. I suppose they should be marked in some fashion. Some of those you have listed here and some of those you haven't, a few you haven't, and they have been put someplace else. But to go at it orderly, I would like to take them in order and—

Mr. Anderson: We intend to list every one of those that you had in that stipulation, Mr. Field. I think they are all right here.

Here they are.

Mr. Field: They are filed with the Court, too, in a separate folder.

The Court: I think they are in this big one here.

Mr. Field: Here is the original of stipulation of Exhibits A through KK.

Mr. Anderson: All right. Exhibits A and B we have given other designations to. Exhibits—for example, we intend to offer the entire document, Exhibit A, and here it is only one sheet, and we have the entire—this is sheet number 2. We have the entire, I think it is 8 pages long, a document we intend to offer in lieu of that.

Exhibit B is coming somewhere down the road. It's the Bureau-Otter Tail contract. I guess it was used with the Muller deposition, and it wasn't marked at this [T. I, 50] point.

All the rest are marked GX-3 through 47 in our prepared offer.

Maybe the quickest way to do this would be for me to offer Exhibits GX-3 through 47, and then you could rule on them. Then I can give this list to the reporter.

The Court: Absent objection, Exhibits GX-3 through 47 may be received.

(GX-3 through 47 offered and received in evidence.)

Mr. Anderson: The next group—

Mr. Field: Just a minute.

Mr. Anderson: I am sorry.

Mr. Field: The other, MM through TT are in another file. They were filed later.

Mr. Anderson: LL through TT?

Mr. Field: Yes. Do you want them marked with your number?

Mr. Anderson: Yes, I would propose that GX-3 be put on, this be marked by defendant, Exhibit Number C, and that the numbers run serially through defendant Exhibit Number, Defendant marked Exhibit TT, right through to GX-47, GX-47

being the number to be given the last of these documents, which, as presently marked, bears the [T. I, 51] Defendant's Exhibit TT number on it.

Mr. Field: You don't mean Defendant's.

Mr. Anderson: Mr. Field's designation TT on the top of the document. I say that merely to identify the document.

Mr. Field: The reason I ask, you have got the alphabet a little bit rearranged here, which isn't important, I guess, unless— I just noticed that this morning. You handed me this morning, L, I, J, K.

Mr. Anderson: That probably happened about 8:00 o'clock Saturday night.

Mr. Field: I think the reporter needs some help to get them in the numbers you mentioned.

Mr. Anderson: Maybe there is some way we can do this so as to save the Court's time. Perhaps what we can do is during a recess or perhaps after the day is completed, one of our people can sit down with one of Mr. Field's people and the reporter and make sure that everything is marked as it should be marked.

Would that be satisfactory? To me, that sounds like the quick way of doing it. If there is any problem whatsoever, then we can report back the next day and present our little problem, if there is any, to you, and you can take care of it.

[T. I, 52] Mr. Field: I don't care how it is handled. I want the Court to appreciate that this list came into our hands this morning with its rearrangement, and we have to accommodate ourselves to the previous listing of those things.

Mr. Anderson: Yes. Of course, I think almost without exception that documents listed here to a large part, of course, have been in Mr. Field's possession since December—they were given to him a month ago, so it's not as though we are

giving him something unannounced. He is right that we didn't have the list ready until this morning. But none of the documents are a surprise.

Mr. Field: I didn't say they were. I am trying to address myself to your offer here, and I need to rationalize my thinking to the new list. There were a few things you handed me this morning, new exhibits, but I haven't objected to that, so far.

Mr. Anderson: The next group—

The Court: Absent objection, Exhibits 3 through 47 may be received.

Mr. Field: Yes, we are agreed on those.

The Court: The record may show that Exhibits GX-3 through 47 may be received.

(GX-3 through GX-47 received [T. I, 53] in evidence.)

Mr. Anderson: Now, I would like to focus attention on Exhibits 48 through 83.

The Court: Absent objection, they may be received.

Mr. Field: If Your Honor please, previously all of these exhibits—they go through 55, do they?

Mr. Anderson: 48 through 83.

Mr. Field: For example, Exhibits 48 through 55 were previously identified only as GX-581 in our group of documents.

Mr. Anderson: We separated them and made them individual exhibits. When we first sent these exhibits to Mr. Field, Your Honor, we had many, many more exhibits then than offered now. The exhibits we had then ran up to 6 or 700. Now we have given them new numbers and there may be some delay, and Mr. Field has to go from the GX number we gave him originally to the numbers we are using today.

Your Honor, maybe it would be of assistance if I just made available for Mr. Field's use here our set of these documents as they are marked by us.

Mr. Field: If Your Honor please, the next group of documents, GX-48 through GX-55, previously identified as one exhibit, GX-581, are contracts or a contract [T. I, 54] with amendments and supplements between Otter Tail Power Company and Minnkota Power Cooperative, Inc., and we have stated in writing we have no objection to the foundation for those exhibits, and we have no objection to their receipt in evidence.

[T. I, 55] GX-56 identified previously as GX-580 is a one-sheet document representing service schedule J transaction under the Upper Mississippi Valley Power Pool between Otter Tail Power Company and Northern States Power Company, and we stated we have no objection to its foundation. I confess I don't see any materiality to it, at least for the record I should object to it upon that ground.

Mr. Anderson: If I may respond, materiality as we see it is the fact that this document does show a sale for resale, what is known as a wholesale sale by Otter Tail Power Company, and Otter Tail has professed in its case not to be making such sales. This shows that they do.

Mr. Field: Well, in answer to that, this is a pool transaction which is vitally different from a wholesale sale as we see it, and I suppose we will have to introduce evidence to explain that situation if the exhibit is received.

Proposed Exhibit 57 previously identified as GX-582, copy of agreement between Otter Tail Power Company and Runestone Electric Association, the foundation for which we have admitted, and I doubt its revelancy, but I don't make any objection to its receipt in evidence.

Proposed Exhibit 58 previously [T. I, 56] identified as 583 is a coordinating agreement between Minnkota Power Cooperative, Otter Tail Power Company, Minnesota Power and Light

Company and Northern States Power Company, the foundation for which we have conceded. I also am of the opinion this is immaterial but I won't object to its receipt in evidence.

This is laborious, Your Honor, but it may give the Court some grasp of the scope of these exhibits. I am not doing it for that purpose, I am doing it to know just what's being offered by reference to our files.

Exhibit 59 previously identified as 584 is labeled a seasonal participation agreement between Otter Tail Power Company and Minnkota Power Company, Inc. I fail to see its relevancy. If the Court wants to receive it we won't object to it.

Proposed Exhibit 60 previously 585 is a 230 kv interconnection agreement between Otter Tail and Minnkota Power Cooperative. It's in the same category as the last two exhibits and in our opinion is of doubtful materiality and I won't make an issue out of it at this time.

Proposed Exhibit 61 previously 587 is a supplement to the last agreement and the same characterization from our point of view.

Exhibit 62 previously 586 is supplement No. 2 to the same agreement and in the same category.

[T. I, 57] Exhibit 63 previously 588, the document bearing that identification previously furnished to us apparently is four documents. How do you propose to mark them?

Mr. Anderson: Just the way they are indicated on the list.

Mr. Field: Then you have four exhibit 63's.

Mr. Anderson: Then A, B, C, D—just a minute. Let me see. This is what we propose to offer, Mr. Field.

Mr. Field: That's four documents.

Mr. Anderson: Yes.

Mr. Field: Just for the record how do you propose to mark them?

Mr. Anderson: For the record we propose to mark all of these documents as one, namely, GX-63.

Mr. Field: Is there just a paper clip on them, they may come apart.

Mr. Anderson: We can staple them firmly together.

Mr. Field: These four documents which have been culminated in one exhibit represent documents involved in interconnection and interchange agreement between Otter Tail Power Company and Minnkota Power and Light [T. I, 58] Company with some supplements and rate schedules and certificates accompanying it. I don't suppose my description is very accurate, but at least they relate to that contract and we have conceded the foundation for the documents, and as is true of many of these ancillary—not ancillary—contracts of this type, we fail to see their materiality but make no objection to their receipt if the Court wants to have them in the record.

Exhibit 64 previously 589 is also two separate documents as furnished us and representing a systems interconnection agreement between Montana-Dakota Utilities Company, Northwestern Public Service Company and Otter Tail Power Company together with a supplement No. 1. That's in the same category as the last few exhibits. I will not say any more about them than that.

Excuse me just a minute, Your Honor.

The Court: All right.

Mr. Field: The next exhibit is identified as Exhibit 65 now and it was previously 590, is a transmission service agreement between Otter Tail Power Company and East River Electric Cooperative, Inc., dated June 15, 1969, and we have

previously conceded its foundation and have no objection to its receipt into evidence.

Proposed Exhibit 66, previously 571 is the original agreement, I guess I could call it, between [T. I, 59] the Bureau of Reclamation and Otter Tail Power Company identified as Contract No. I-79R-1592 and dated March 14, 1950. We have conceded its foundation and it may have some relevancy by way of, "Background." It is not the currently effective contract and has been superseded, but I have no objection to its receipt for what benefit it may be.

Mr. Anderson, do you have the document itself that was marked Muller's Deposition Exhibit 32 that you are going to mark as an exhibit in this case?

Mr. Anderson: Yes.

Mr. Field: It is the current and effective contract between the Bureau and Otter Tail Power Company and is an important document. We have a copy of it, but I would like to see the copy you are going to mark.

Mr. Anderson: And we have a copy here but we have had a kind of a momentary breakdown here and can't at the moment put our hands on it but we will have it.

Why don't we, in order to move things along, Mr. Field, this is exactly the same thing and we will mark it as GX No. 67, the supplement No. 2 to the Bureau-Otter Tail contract which bears the date June 14, 1955, contract No. 179R-1592, and in the upper right-hand corner it bears the notation Exhibit B which is the notation, as I understand it, that Mr. Field put on the document when he [T. I, 60] sent it in pursuant to his stipulation as to foundation.

Mr. Field: Just a detail, but that first identification number is I and not "1".

Mr. Anderson: I am sorry.

Mr. Field: It gets lost every once in a while in the description.

We have no objection to receipt in evidence of Exhibit 67 which is the Bureau-Otter Tail contract dated June 14, 1955, and is the contract between the parties under which they are operating, some supplements to it, but that takes the place of the previous contract between the parties.

The Court: Well, we can recess now. For the record Government Exhibits GX-48 to and including Government's Exhibits 67 may be received.

(GX Exhibits 48 through GX Exhibit 67 received in evidence.)

We will recess until 2:00 o'clock this afternoon.

(Whereupon, a recess was taken until 2:00 o'clock p.m., June 1, 1971.)

[T. I, 61] (June 1, 1971, 2:00 o'clock P.M.)

Mr. Field: May I proceed, Your Honor?

The Court: Yes, you may.

We left off with number 67.

Mr. Field: Yes, Your Honor. We did what work we could during the recess, and I will try to lump some things together and hasten things up as much as we can.

Proposed Exhibits 68 through 75 are a series of supplements to the Otter Tail-Bureau of Reclamation contract referred to in Exhibit 67. We have no objection to those exhibits.

The Court: 68 through 75 may be received in evidence.

(GX-68 through 75 received in evidence.)

Mr. Field: Exhibit 76, previously 603, is a general coordinating agreement between Northern States Power Company, Minnesota Power and Light Company, Cooperative Power Association and Otter Tail Power Company.

We fail to see the materiality of that contract to the issues for trial, but we will not object to its receipt in evidence if the Court desires to have it as [T. I, 62] part of the records.

Now, the next exhibits, 77 through 82, are various agreements between several cooperatives, rural electric cooperatives and Otter Tail Power Company, as listed in the list of exhibits, and we have conceded the foundation for each of those agreements. We fail to see their materiality, but will not object to their receipt in evidence.

The Court: They may be received.

(GX-77 through GX-82 received in evidence.)

Mr. Field: Proposed Exhibit 83, which contains as one of the sheets therein labeled original sheet number 2, one of the exhibits which was identified in the additional stipulation of October 10, 1970, which is a general explanation of Otter Tail Power Company's policies and practices and which we agreed to and proposed as an exhibit ourselves, and attached to that now are some additional sheets of 1947 rate filings of Otter Tail Power Company with the Federal Power Commission, and of which that statement was a part.

[T. I, 63] Apparently the copy which plaintiff has proposed as Exhibit 83 isn't complete either in that certain parts were omitted which perhaps isn't too significant but I would like to say this, that the schedules which are attached to and a part of the present Exhibit 83 are no longer in use. Otter Tail Power Company has no wholesale customers at the moment and no one receiving electric service under these rates as the evidence will show. However, if the information is of any help in the case we won't object to Exhibit 83.

Now we come to Exhibit 84 which is an additional stipulation of facts, supplement No. 1 dated April 26, 1971. That's a 29-page document and some of that we object to as we pre-

viously notified counsel and filed our response with the Court, and the balance of it there isn't objection to so I suppose I should delineate in the record the portions of that that we do have objections to.

The fact of the matter is, the first portion of it relates to Elbow Lake and is the part just for identification mentally that I referred to this morning in my response to counsel's opening remarks with reference to Elbow Lake. I will refer to paragraph numbers and with the exception of the numbers that I identify we have no objection to any part of this stipulation.

The stipulation itself is as to the [T. I, 64] foundation for these facts, the right to object to the materiality or other appropriate grounds which were reserved.

Paragraph five we objected to on the ground that it refers to an engineering report which is not sponsored by the engineers who prepared and submitted it as saying who should be subject to cross-examination in connection with the document. We don't contest the fact that the village retain these engineers and that he submitted the report which is what the stipulated paragraph five says, but we do say that the engineer who prepared it should be a witness so we could cross-examine him about the report because the report may otherwise be in evidence and we think the author of it should be here as a witness.

That same type of objection will apply to each of the other towns. Perhaps I should identify them all to save time if I can do it that way.

With reference to Hankinson it's paragraph 19.

With reference to Colman it's paragraph 34.

With reference to Aurora it's paragraph 50.

With reference to Finley, North Dakota, it's paragraph 65, and we make the same objection with reference to each paragraph of similar nature, for each of these [T. I, 65] towns.

We object to the material contained in paragraph 9-A through Z inclusive on the grounds that the material included therein is in the area of what has been called political and campaign material which is objected to generally upon the grounds of materiality and, more specifically, that such evidence is inadmissible under the Noerr, Pennington and related decisions under which activities of this kind are completely immunized from the application of the antitrust laws. A more complete statement of our position in this regard is in our trial brief, of course. That's that list of campaign material both for and against municipal power in Elbow Lake.

Now, there is similar material with reference to each of the other towns, and I will identify those paragraphs at this time for convenience. With reference to Hankinson it's paragraph 27, subparagraphs A through Q inclusive.

With reference to Colman, South Dakota, the same material as contained in paragraph 30, subparagraphs A through J inclusive.

With reference to Aurora, South Dakota, the material is contained in paragraph 57, subparagraphs A through G inclusive.

With reference to Finley, North Dakota, [T. I, 66] the material is contained in paragraph 72, subparagraphs A through Y inclusive.

I guess I have already stated that we have agreed to the foundation for these exhibits. It's their admission on substantive grounds that we are making our objection, Your Honor.

Now, paragraphs 73 through 106 of the stipulation relate to matters as Your Honor has already ruled upon but I sup-

pose for the record we should interject an objection at this point with reference to this stipulation. They relate to the factual matters with reference to Sanish and Van Hook, North Dakota; Hong, North Dakota; Dakota City, North Dakota; White Spur, North Dakota; Woodworth, North Dakota; Georgetown, Minnesota. That gets us through paragraph 101. I better stop there. They relate to towns that discontinued service from Otter Tail for reasons unrelated to the issues in this case such as I mentioned this morning. Some were flooded by the dam and some were conveyed for business reasons and so forth.

[T. I, 67] Paragraphs 102 to 106 relate to the sale of some property to Red River Valley Cooperative Power Association, which is unrelated to any issue in this case, as we see it, that conveyance made on mutually satisfactory terms and it's referred to in Mr. Hartl's deposition, and the facts surrounding the transaction as they are stated show its distinguishment and its inapplicability to the facts in this case.

Now, except for those paragraphs, which relate generally to areas, most of which we have discussed, publicity material and other distinguishing factors, except for those paragraphs, we have no objection to, and, in fact, we join in the offer of this additional stipulation of facts, supplement number 1.

Proposed Exhibit 85 is a copy of a franchise granted by Elbow Lake to Otter Tail Power which is dated in 1940, which we characterize as being part of the ancient history and should be excluded by materiality and pleadings without repeating all the other discussion in that area that we engaged in this morning.

Proposed Exhibit 86 is a letter written by Mr. Wright of Otter Tail Power Company to Elbow Lake back in the 1950's,

which falls in the same category, and we object to both 85 and 86 upon the grounds stated.

Now, there are several exhibits [T. I, 68] listed, proposed exhibits listed which relate to litigation. I will try to group them for the purpose of the record, if I may do it that way.

Exhibits 87 through 90 relate to some litigation in Elbow Lake back in 1950 and 1951, which, in addition to our general objection to evidence on litigation, also falls into the category of being at a remote point of time.

Exhibits 105 through 106-A relate to litigation in Elbow Lake in the 1960's and we do not have the objection as far as remoteness in point of time, but subject to our general objection as to litigation.

That is also true as to Exhibit 110. It's the same piece of litigation that I just mentioned.

Exhibits 131 through 140, inclusive, relate to some litigation surrounding the Hankinson matter, in none of which is Otter Tail Power Company as plaintiff. Several of them involve proceedings started by Hankinson itself against Otter Tail Power Company and one has several documents involved in a taxpayer's case against the City of Hankinson, if I can use that description for the case. I understand the Justice Department has evidence concerning what connection Otter Tail is claimed to have with that litigation, but they are not a party plaintiff to it. I will just say that to be fair as I go along here.

[T. I, 69] Exhibits 150 through 167, inclusive, relate to documents concerning some litigation surrounding the Colman problem, situation, in some of which Otter Tail Power is plaintiff, along with some other individuals. Several of the exhibits involve a case brought by the City of Colman against Otter Tail Power Company. Several of the documents involve

a mandamus proceeding in which citizens of Colman were the ex rel party plaintiffs, and in connection with which the plaintiff claims Otter Tail had some connection, which the evidence will doubtless go into if this area of testimony is admitted in the case.

Exhibits 186 through 198 are documents surrounding some litigation involved in the Aurora problem, some of which also had individuals as parties.

Unless I missed some, those are the proposed exhibits that relate to litigation in this list and in connection with which we object to them collectively and separately, generally, upon the grounds of materiality, and more specifically, upon the grounds that each particular case was individually brought, presented and tried in the courts on the merits of the determination of legitimate facts and legal issues and the presentation and trial of each said case was in the proper exercise of the constitutional right of the parties having free access to the courts of the land, which fundamental rights are protected by the Bill of Rights.

[T. I, 70] This position is also covered more thoroughly in our trial brief.

In connection with this area of litigation, I would also like to state that we have not objected to the foundation of these exhibits. We would object to them on the substantive ground, but also, the foundation was admitted on a conditional basis, and this is it, as stated in our response which we filed with the Court and served on counsel, it is provided as follows: "In the event the Court admits any of this material, all of which relates to litigation, that the documentary evidence as to each case be complete rather than fragmentary, and that will require documents in addition to those proposed by the plaintiff."

In substance, I will say to counsel that it will include those documents that we proposed when we were attempting at one stage to arrive at a stipulation as to foundation. I say that now in the event the Court receives this evidence on litigation, that we submit it should then be complete so that the Court will have available to it the complete information on what was litigated, the reasons for it, and so forth, to be considered by the Court.

Mr. Anderson: Your Honor, at this point I wonder if it would be appropriate for me to make some general responses to what Mr. Field has said?

Very briefly, I would like to [T. I, 71] point out with respect to campaign and publicity materials and the litigation, we do not propose to go into any of these matters in direct testimony with any of the people from the towns. The only examination will be with respect to litigation in connection with the bond attorneys, and that is just going to be limited to their discussion of what impact the litigation had upon the marketability of the bonds. That is all we will do in the direct testimony concerning those points.

Our trial brief sets forth the basic legal predicate which we use as a basis for offering this material. We offer campaign material on both sides of the issue so as to show what the debate consisted of. We don't ask that these documents be accepted with full weight because we realize that the people who prepared the documents are not here to testify about them. They do show what was being said at the time. They put in perspective, without having to spend much of the Court's time doing it, what the essential issues in the debate were, how each side presented their point of view. They show that Otter Tail had an opportunity prior to the election to fully and completely present its views as to the advisabiilty of setting

up a municipal power system, and having done that, election was held and the people decided.

In addition, as we mentioned this [T. I, 72] morning, some of these documents show that in connection with Otter Tail's efforts to persuade the people to stay with Otter Tail, Otter Tail indicated that it was proposing improvements of one type or another. We think that type of information is for the Court because it shows what is to be derived from the proposed competitive system on one hand and Otter Tail on the other.

[T. I, 73] Mr. Field: Well, counsel has indulged in argument. I was just making objections to exhibits. I would be glad to continue the argument at the appropriate time. Perhaps I should proceed with the objections.

Except for the areas that I selected which I grouped together throughout the entire deposition, I think we now go on with 91. Exhibits 91 through 99 are letters from or to Otter Tail Power Company all involving Elbow Lake. Now, we have conceded foundation for these exhibits because they are written to or from Otter Tail so we know all about them and admit they were written and received as indicated. The problem that we have with the letters that were written to Otter Tail in this and other regards as we go along are that they contain, in many cases, statements and arguments and presentations of factual matter which may be contested in many cases.

In other words, the fact the letter is received in evidence doesn't prove the truth of the facts that are stated in the letter. You need a witness to do that. At least that's our position, and unless the receipt of the letter is limited in some fashion to just proving the fact they were written rather than the truth of the facts that are stated therein, I suppose

there are exceptions to that general statement. We would object to them as self-serving and hearsay. I think that will be [T. I, 74] true of quite a few documents that counsel has proposed, quite a number of letters, some of which are to and from Otter Tail and some aren't as a matter of fact.

Any letter written by Otter Tail they will have to accept the responsibility for those statements all right, they are here, the witness who wrote them and will be witnesses at the trial.

Mr. Anderson: If I may say, we have the people from the town, most of the people from the town who wrote these letters and if we need to put them on the stand and go through the exercise of having them authenticate and explain to the extent that it's necessary, we don't think it is necessary, but if need be we could do it that way. Most of these letters are short and most of them are in the form of requests. You sell the power, will you do something or other for us; we are thinking about setting up a municipal system, this is what we would like for you to do, what do you say and his reply. If you want us to put witnesses on to do that, we have four people here. We may need to get a couple others to do that. We felt that it wasn't necessary to do that, that the letters were basically referring to matters which are, I think in general, matters of fact but if the Court so desires we will put the witnesses on.

Mr. Field: If counsel is going to have a witness on the stand so I can cross-examine him about [T. I, 75] the contents of the letter we don't have any problem. If the letters are offered of proof of facts as stated therein we object to them as self-serving.

Mr. Anderson: We offer them on that basis, and we will have these people on the stand, and should Mr. Field want to

explore any aspects of any of the letters with them, of course, he would have the opportunity to do so at that point.

If there is any factual issue or any fact, allegedly factual statement in the letter which Mr. Field contests then, of course, it seems to me on cross-examination these four people he could at that point seek to handle that problem.

Mr. Field: Well, I just spoke generally from seeing a good many of these letters, I have seen them all, but just from general recollection of the subject matter that they open up subject matters I want to cross-examine on. I don't want to be met with the objection I am going beyond the scope of direct just because you ask him if he wrote a letter.

Mr. Anderson: No. I will not object to that on that ground.

The Court: With that understanding they may be received.

(GX Exhibits 91 through 99 received in evidence.)

[T. I, 76] Mr. Field: Exhibits 100 through 103 are various memoranda between personnel of Otter Tail and we have no objection to their receipt. Did I say 103 or 104?

Mr. Anderson: 103 you said.

Mr. Field: 104 is in the same category and should be added to that.

Exhibits 107 and 108 are letters in the same category as the matter we just discussed to Mr. Hartl and subject to the same understanding I presume.

Mr. Anderson: Yes. Well, the only problem there, as you recall, I indicated that I have been advised by Mr. Wolter's attorney that Mr. Wolter is in a state of very bad health, such that it probably would be an imposition upon him to come down and testify.

Mr. Field: Let me look at this exhibit and see what its content is. Do you want me to do it now?

Mr. Anderson: No. But I want to point that out that we do have that problem and this morning in my opening remarks I omitted Mr. Wolter from my list of witnesses inadvertently. He was on our list. We are not planning to call him unless it's somehow necessary. We only had four documents for him and he is in bad health, and if need be perhaps we could depose him if it comes to that.

[T. I, 77] Mr. Field: Are there more than these two?

Mr. Anderson: These are the only two in this group. I think there is a letter which he wrote to Mr. Martinson which we will put in through Mr. Martinson or at least attempt to. There are two letters in exchange between Mr. Martinson and Mr. Wolter. Those two plus these here are all we have.

Mr. Field: Perhaps when it is convenient I can review all of those and see if we can make an exception to our understanding in view of what you say about his condition.

Mr. Anderson: All right.

Mr. Field: Exhibit 109 we have no objection to.

Exhibit 115 which is a copy of an Electric Franchise from Hankinson to Otter Tail Power Company, dated May 29, 1931, we object to upon the ground that it's remote in point of time and immaterial.

Mr. Anderson: If I may interject here a moment, we have offered the four franchises for each of these four towns. We do that simply in order that the record will show what a franchise looks like. We talk about these towns being franchised for a limited period of time. We talk about what the franchises say, but nowhere [T. I, 78] in the record unless we put these in is there any indication of what a franchise actually looks like, and that's the reason we put them in. It just

happened that the 1931 franchise happened to be the last one that was in existence between Otter Tail and that town. That is the reason we went back that far and that's the reason we put the franchises in.

Mr. Field: Well, it seems like that's a weak basis for the offer of a particular exhibit. If you want a franchise form we will furnish you one. If you just want a sample.

Mr. Anderson: Well, we are talking about the expiration of franchises in these four towns. We are talking about what the terms of the franchises were in these four towns, and it seems to me this is the appropriate place to start. We are starting in each town with Otter Tail serving the town pursuant to a franchise. What's the franchise look like that they are operating under? Well, this is it. This tells what it is, and this, it seems to us is the logical starting point in the discussion of what happened in the towns. This is where we start and we move from there to the effort by the town to do something different.

Mr. Field: Well, you are shifting ground. You are saying it's background now.

[T. I, 79] Mr. Anderson: Well, it's really both.

Mr. Field: Of course, franchises aren't identical in these towns. There are differences so we can't use the Hankinson 1931 franchise as an example for other franchises.

Mr. Anderson: That is why we offered one for each of the four towns so we wouldn't have any problems of that type.

Mr. Field: I guess my original objection should stand then. It's remote in point of time and immaterial.

Going on then from there with Exhibits 115—I am sorry, that's the one I just talked about. Exhibits 116 through 130 also generally refer to correspondence, that is, letters from

and to Otter Tail and presumably will be subject to the same understanding that we just talked about.

Mr. Anderson: So understood. That understanding being that I won't object when you cross-examine the witnesses as to your going outside the scope of my direct examination.

Mr. Field: I guess the witnesses here are all among those you are going to call, aren't they? Woytassek is here in court and Mr. Bartel.

[T. I, 80] Mr. Anderson: Right.

Mr. Field: That gets us down to 141, I believe, and skipping the groupings of litigation and so forth that I have already covered. Now, proposed Exhibit 141 is a letter, Mr. Hartl to Hankinson, a photostatic copy of which is included in the additional stipulation of facts, supplement No. 1 in paragraph 28, and the letter itself on page 11, and the copy of the document that is in the stipulation is a letter more complete than the copy that you have proposed and in that it has Mr. Hartl's signature, it's on the letterhead of Otter Tail Power Company and it's actually a photo of the complete letter; and if you want to duplicate it with another copy, all right, but I want to call attention to the fact it's already in evidence as a part of this stipulation.

Mr. Anderson: We were reluctant to—we didn't know what was going to happen to that stipulation. We didn't want to tear it apart and out of excessive caution we marked the thing separately here. It doesn't make any difference to me how we handle it. It's going to be in one way or another I guess.

Mr. Field: Well, it can be in both ways if you want it.

Mr. Anderson: Maybe for the sake of moving ahead maybe we ought to leave it in where it is with [T. I, 81] a notation

that through the Government's inadvertence it's already in elsewhere.

Mr. Field: Obviously we have no objection to it and we join in the offering of it as part of the stipulation.

Now, proposed Exhibits 142 and 143 are also covered in the additional stipulation supplement of facts No. 1, the campaign material I have already described in the record with reference to Hankinson included in paragraph 27-A through Q inclusive. Of course, we have the same objection to them no matter what form the offer is made in.

The material is there described and also included in documents filed in the stipulation. Did you anticipate duplicating that?

Mr. Anderson: Well, the stipulation itself only referred to the foundation for the documents so we included these two, GX-141 and 142 here, as the compartments where we actually put in, physically put in the documents themselves.

Mr. Field: Well, you have offered the whole stipulation?

Mr. Anderson: We didn't want to scissor that part out of the stipulation.

Mr. Field: I understand you offered [T. I, 82] the whole stipulation.

Mr. Anderson: We did offer the whole stipulation, but as I understood it, that stipulation with respect to these documents only went to the foundation of them and we are going beyond that. We are actually physically taking the documents themselves and offering them here.

Mr. Field: I guess I don't communicate well. Physically the documents are already on file along with the stipulation.

Mr. Anderson: Yes. But the stipulation that we have marked here is to go in just standing alone as I understand it. We have taken the documents away from the stipulation and

we have put them all in right here, at least as to Hankinson
Those Hankinson documents are going in here in 141 and 142
at least we are offering them here as GX-141 and GX-142 an
they are not going in appended to the stipulation. I don't car
This is the way we set it up here. It's six of one and half
dozen of the other. It doesn't make any difference to m
which way we do it. As far as I am concerned we can do
this way. It's clear enough.

[T. I, 83] Mr. Field: Six of one and half dozen of th
other is a good summary of it, but we have so many document
here, it will be nice to know which ones we are talking abou
If the documents on file have been actually removed from th
file and remarked and we have seen those documents. If yo
have some new documents, they should be checked out, n
that you would do anything intentionally, of course.

Mr. Anderson: Yes. That it what I suggested this mor
ing, and I will reaffirm my suggestion now that perhaps th
best way to do it will be to go through the rest, and then
the extent there are any problems with respect to the markin
which documents are actually marked, we can thrash that o
among the three of us, the reporter, you and I and make su
that we all understand what is marked and what is n
marked, and if there are any problems after that, we c
approach the Court with it.

Mr. Field: I suggest that we take the actual documen
27-A, B, and so forth and put your number on. How will th
be? Is that all right?

Mr. Anderson: Sure.

Mr. Field: Exhibit 144 is a copy of a franchise fr
Colman, South Dakota, to Otter Tail dated October 24, 19
It's another exhibit that we object to upon grounds it is rem

in point of time and no bearing upon [T. I, 84] the issues in the case.

I assume you will have someone to identify its authenticity from Colman, as far as that part of it goes?

Mr. Anderson: If you are objecting to it on the grounds of authenticity, we will do that.

Mr. Field: We have not conceded it up to today. If you are going to have someone from Colman, I suppose—

Mr. Anderson: Since it is a franchise from Otter Tail Power Company, I assumed it wasn't any real problem.

Mr. Field: It was so ancient I guess we didn't really process it. Anyhow, our main objection is on substantive grounds, I will be frank to say that.

Exhibit 145 is a letter from somebody by the name of Strohmeier, I believe an engineer, to a Mr. LaTourette, an Otter Tail man. Mr. Strohmeier is not one of your listed witnesses so that letter presents a problem as far as cross-examining the author of the letter is concerned.

Mr. Anderson: One of the reasons we offered the letter from Strohmeier to LaTourette is because the next exhibit is a letter from LaTourette to Strohmeier, and as we were looking through the law of evidence we discovered that frequently it is deemed proper, when you are dealing [T. I, 85] with an exchange of correspondence, to put in both sides of the correspondence so that whoever is looking at the document will understand what the followup letter is referring to. This is one of those instances here, where, in order to understand the LaTourette to Strohmeier letter, one really ought to have the letter from Strohmeier which prompted Mr. LaTourette to write his letter. As I understand, it's generally called a rule of completeness with respect to correspondence. That is the reason we put in both sides of the correspondence here, to

make it one complete package. If we just put in the letter from LaTourette it may not be sufficiently explanatory as to what Strohmeier was talking about.

Mr. Field: To the extent that Exhibit 145 sheds light on the answer from Mr. LaTourette, Exhibit 146, if it is offered and the offer is limited to that purpose, I don't object to that. If there are other facts stated in there or arguments presented that don't fall into that category, and I don't have the letter in front of me, then I would think it would not fall within the rule you mentioned.

Mr. Anderson: The only part of this 1960 letter from Strohmeier to LaTourette we are concerned with is the request by Strohmeier on behalf of the city, the inquiry by Strohmeier to Otter Tail as to whether Otter Tail was interested in the sale of its distribution system, the [T. I, 86] price if they were interested in selling it, whether the company was interested in selling power on a wholesale basis, and if so, the rates and terms. That is the reason we put it in, so that the letter from LaTourette to Strohmeier in reply makes some sense. It's a request and a response, and we put the Strohmeier letter in for that limited purpose, to show what the request was.

Mr. Field: Well, we are getting into a lot of details, Your Honor. I have both letters in front of me now, which I didn't have when I was discussing this. The answer is very short: "We have your letter of January 29th relative to the city of Colman relative to your firm making a report on their requirement cost results should the city elect to own and operate a municipal electric system. I am taking this up with our general office in Fergus Falls and after considering the request you have outlined in your letter of January 29th, you will be hearing from us."

Is there another letter?

Mr. Anderson: Yes, I believe there is, number 147. That is a more detailed letter by Mr. LaTourette to Mr. Westling, in which Mr. LaTourette calls attention to this letter of Strohmeier's and his response thereto.

Mr. Field: I think, upon reviewing 147 along with 145, which you say your purpose is of 145, [T. I, 87] to justify, Mr. Anderson, I don't know that it is needed to understand 147, but if you wanted to precede it, I have no objection.

Does that take care of that one?

Mr. Anderson: Yes.

Mr. Field: I am bothered somewhat, counsel, and the Court, in trying to do this hurriedly, not looking at each letter as I go along, to see what the content is.

I suppose Exhibits 148 and 149 are in the same general class, letter from Carl Miller to Otter Tail Power. He is not one of your witnesses, is he?

Mr. Anderson: No, he is not. There, again, the letter from Miller, our only interest in that is to show what Mr. Miller's question was of Otter Tail. 149 is the reply to Mr. Miller's request.

Mr. Field: That seems like the other, and we don't object to either one.

The next few exhibits look like campaign material for Colman. Perhaps you can tell me, 168 through 171, are they in addition to that campaign material listed—

Mr. Anderson: It is our understanding that these are in addition to the materials that are contained in that stipulation concerning campaign material.

[T. I, 88] Mr. Field: Then we should and do object to Exhibits 168 through 171, additional campaign publicity material, on the same grounds that we objected to the other proposed evidence in that same area, they not having been in-

cluded in the documentary material that we referred to when we made our previous objection.

I come now to 172, which is a letter from Haugen to LaTourette. Is that an exchange of correspondence, too, or does that stand alone?

Mr. Anderson: That stands alone.

Mr. Field: Despite that, we won't object to it. I am taking the trouble to look at them now. I have seen them before, however.

Exhibits 173, 175, and also 176 and 177 are letters to and from Otter Tail relating to a dispute or problem concerning the contractor building a new distribution system in Colman, climbing Otter Tail's poles or otherwise interfering with Otter Tail's distribution system which was still in operation.

Is Mr. Mohlman going to be called as a witness? Are you still interested in these?

Mr. Anderson: Yes, I am.

Mr. Field: Exhibits 173, 175 and 177 are also written by Mr. Warren Nye of the Otter Tail Power Company, and we have no objection to those. Exhibits 174 and [T. I, 89] 176 are letters written by Mr. Pederse[illegible] Mr. Nye, and I believe from looking at them just now it refreshes my memory that they do contain statements of fact that we would like to cross-examine the authors of those letters for. If the purpose of the offer is limited to a mere explanation of their reply, I wouldn't object to them, but if they are offered for the truth of the facts therein contained, I would.

[T. I, 90] Mr. Anderson: 174 is a reply to a letter sent by Mr. Nye complaining about people climbing its poles. That's a response to a letter by Mr. Nye, sent by Mr. Nye.

176 we put in just to show what Mr. Miller was—what Mr. Miller said apart from, we realize Mr. Miller is not going to

be here to testify, but his letter will at least show what he was saying to Otter Tail and let it go at that.

Mr. Field: I don't know what that leaves us. As I say to the extent letters written by third persons explain letters written by Otter Tail, if it's limited to that I have no objection, otherwise we object to the letters from third persons on the ground that they are self-serving and hearsay.

The Court: Maybe it's a good time for us to recess, do you think? How are we getting along, do you think? Do you think we are making progress?

Mr. Anderson: I think we are making splendid progress. I think there is a very decent chance that at the rate we are going we will be finished with this pile of documents by the end of today.

The Court: Is there some more efficacious way we could go about it do you think?

Mr. Anderson: Well, a big chunk of [T. I, 91] the last portion of the documents from 200 to 294, roughly, are documents which were used with Mr. Muller in his deposition, and I suspect that that proof will be—that's all pretty fresh in our minds since we went through all those documents last week, and I suspect we will be able, at least hopefully, I think we will be able to move through those fairly quickly and that's a big chunk of the remaining part, and if we get through this today we are going to be through with about 80 percent of our case.

The Court: All right. We will recess for ten minutes.

(Recess taken.)

Mr. Field: My helpers called my attention to one or two things that I omitted so we go backwards instead of forwards but only just for a moment.

Exhibit 114 I don't believe I commented on, and I don't believe that foundation has either been laid or admitted for that exhibit. You might check it over, but for the moment I don't recall it. It's mentioned in the Seashore deposition, but I don't think the authenticity is.

Now, there are several groups of campaign material which I might pick up, all statements that are duplicated in the list of exhibits similar to the Elbow Lake group that we did mention and which are covered in the [T. I, 92] additional stipulation of facts, supplement No. 1.

Mr. Lundeen tells me I did not mention Exhibits 142 and 143. I thought I had. Anyhow, they are campaign material with reference to Hankinson and are covered in the stipulation paragraph 27-A through Q, and the publicity materials with reference to Colman are duplicated in Exhibits 178 and 179, they being covered in paragraph 42-A through J of the stipulations.

The campaign publicity or materials with reference to Aurora are duplicated in Exhibits 201 and 202, they being covered in paragraph 57-A through G of the stipulation.

Now, with reference to each—excuse me, once more. The campaign and publicity material with reference to Finley is duplicated in Exhibits 292 and 293, they being covered in stipulation paragraph 72-A through Y inclusive.

Now, with reference to each of those exhibits I suggest we handle it the same way as we discussed with reference to Elbow Lake, taking the original stipulation ones and putting a new number on and they will be identified with both methods.

Mr. Anderson: That's fine.

Mr. Field: Of course, they are subject to our objection as to campaign and publicity [T. I, 93] material which we have

already stated. I won't restate it now in connection with this duplication.

Now I think we are down to 180 according to my notes. Exhibits 180 and 181 being the franchise and municipal contract with Aurora, we have no objection to. I assume, of course, Your Honor, that when I say no objection to, it's subject to the comments I made this morning that I thought all this was immaterial in view of our stipulation as to ultimate facts that these things happened and so forth, that we were now going into the details of it and I am not repeating that argument in connection with these exhibits. It will apply to the whole bunch of them, of course.

Exhibits 182, 183, 184, 185 are documents originating from Otter Tail people and we have no objection to them.

Mr. Anderson, Mr. Lundeen calls my attention to the fact that your proposed exhibit No. 183 does not have any other identification so we apparently don't seem to be able to locate that document.

Mr. Anderson: It's GX-415 and here is a copy.

Mr. Field: Thank you. We are then down to 199. We have no objections to 199 or 200.

Then that gets us to proposed Exhibit 203. We have no objection to 203.

[T. I, 94] That gets us to 204 which are five volumes of the deposition of Frederick Muller which was taken last week. We had some problems—

Mr. Anderson: Your Honor doesn't have a copy of this, I don't believe.

Mr. Field: We had some problems, Your Honor, in connection with this deposition in that as the deposition progressed, there are objections made to certain questions and areas of testimony, and I don't know just how we should go

about handling that. If Your Honor wants them called to your attention individually I suggest we do it in the morning so that we can get at the precise pages where the objections are. I don't think we have them all identified.

I could do it in a laborious way now if required but I think it would facilitate matters if we postponed that if Your Honor would like to have them called to your attention as we go along.

The Court: All right. Maybe you can make a memo pointing out the ones you object to.

Mr. Field: I could do that, too, but not overnight. I don't have any clerical facilities available.

The Court: I appreciate that.

Mr. Field: Your thought is I could [T. I, 95] furnish it later?

The Court: Sure.

Mr. Field: Is that satisfactory? It would be the page and the line and so forth.

The Court: Yes.

Mr. Field: Rather than a presentation of the substance of it?

The Court: Yes.

Mr. Field: Then we pass on to Exhibits 205 and 206. We have no objection to either exhibit.

Exhibits 207 and 208, 209, 210 and 211, we have no objection to any of those exhibits.

Now we come to a long list of letters the foundation for which was laid as far as their foundation is concerned in the Muller deposition, but we have problems and objections to their admissibility, or most of them, at least, unless they are written to or from Otter Tail which I don't believe occurs very often in this list of exhibits, upon the grounds that they are

letters written to and from third parties and are written by persons not in court subject to cross-examination with the exception of a few that were written by Mr. Muller, and he was here and we did cross-examine him and those particular ones could be identified.

[T. I, 96] With the exception of those letters that I have thus identified, and with the exception of any that may be substantiated by the author in court here so we can cross-examine the parties in connection with it, we would be obliged to and do object to their receipt in evidence as proof of any facts that are stated therein. If the offer is of a more limited character, we would be glad to consider it.

Now, I suppose I could go through this whole batch. There is quite a long list of them, but they generally refer to proposed Exhibits 212 through 285. There are some of those documents that aren't letters, but they do represent either actions or communications by third persons. I will except from that general classification Exhibit 235 which is a contract between the Bureau of Reclamation and the Basin Electric Power Cooperative, to which we have no objection; Exhibit 236, which is a map and which Mr. Muller supported, to which we have no objection; Exhibit 238 which is an application by the City of Colman to the Bureau for power, which Mr. Muller supported. We have no objection to that.

Exhibit 241 is an application by the City of Aurora to the Bureau for power, which Mr. Muller supported. We have no objection to that one. Exhibits 245 and 246 are contracts between the Bureau of [T. I, 97] Reclamation and Aurora, which have been properly supported; at least, we have no objection to those exhibits. Exhibit 250, which is an application by Hankinson to the Bureau for power, I believe. We have no objection to that exhibit.

Exhibits 259 and 260, which have the label of applications by Elbow Lake, and if my memory serves me, they are applications to the Bureau for power, and we have no objection to those exhibits. Now, with the exception of those that I have stated we have no objection to, the remainder of this group of exhibits, I believe, are letters of a nature that I described in my original statement of objection.

Mr. Anderson: If I may just interject a brief note concerning those letters, a substantial, perhaps half of those letters, a substantial portion of those letters, perhaps half, are letters written by people at the Bureau of Reclamation to third parties. We went through a lengthy exercise with Mr. Muller getting him to authenticate those documents that were sent by the Bureau, getting him to go through, in effect, the ritual that one goes through under the Business Records Act, Section 1732; and we also went through the exercise of connecting those letters that went out from the Bureau with the other half of these letters that Mr. Field referred to, namely, the letters that came in.

[T. I, 98] By and large, the letters that came in were letters which asked the Bureau for power. In many cases, that's what it is about, "Do you have any power to sell?" The letter that went out said, "No," generally. As we indicated earlier with respect to some other correspondence, in order to make any sense of it, you have got to have the letter from as well as the letter back to. We feel that all of these letters have been perfectly well authenticated. We feel they all combine the ambit of the Business Records rule. They were sent to the Bureau. The Bureau in the course of its regular business of processing and replying to requests for information did so, kept the letters in the files and what not. So we feel that the

deposition itself sets a proper foundation for the receipt into evidence of these letters.

We spent a fairly considerable amount of time during the deposition laying a basis for the applicability of the Business Records Act insofar as these letters were concerned, and we think we succeeded in that regard.

Mr. Field: Well, as I stated, the foundation for these exhibits has been established. We don't question that. It's their admissibility for proof of the facts therein stated and the subsequent grounds that we object on, and their use for that purpose.

[T. I, 99] Mr. Anderson: Well, our discussions concerning the Business Records Act all relate to something other than authenticity. It has to do with admissibility. We say that business records excepting to the hearsay rule is applicable to these documents and we feel that we succeeded in our endeavor with Mr. Muller to establish that these letters are in fact proper business records, properly maintained, and so forth, thereby qualifying them as business records, and therefore are admissible.

The Court: Is there some prejudice that might arise by letting them in?

Mr. Field: Some of them.

The Court: What would be an example?

Mr. Field: Well, I suppose I had better document an example; that there may be statements in some of them about the inability or failure of Otter Tail to do certain things for certain reasons. I would have to look at the documents to see which ones of this group might include such statements.

There are also statements in some of these letters which refer to the supply of power that the Bureau may have in one category or another category, either in Class 1 power or as

Class 2 power or before 1971 or '73 or '77, all of which are quoted for the general statement that they haven't anything more to sell, and that type of [T. I, 100] thing is subject to cross-examination, in my opinion anyway, to the extent that Mr. Muller affirmatively testified as a witness on those grounds, he has been cross-examined, but to offer letters written by someone other than Mr. Muller to John Jones, not to Otter Tail, back and forth, we submit is not proper proof of those facts.

Mr. Anderson: Well, a very substantial portion of those letters, even though they were not in fact signed by Mr. Muller, as the deposition will show, were drafted by him or were drafted under his supervision, so that his testimony concerning these letters established without any question, so far as I am concerned, that they, the letters, were in fact sent, that he was familiar with them, that he was able to testify as to the contents of the letters and, in fact, he was cross-examined on a lot of them.

Mr. Field: That is a limited number of the letters. To the extent that the deposition shows Mr. Muller drafted them, why, I won't object to their receipt because I did cross-examine about some of them, but he conceded he had nothing to do with the drafting of a good many of them.

The Court: Have we discussed all 294 exhibits now?

[T. I, 101] Mr. Field: Not quite. Exhibit 286 we have no objection to.

Now we come to depositions of Albert C. Hartl, Warren K. Nye, Robert W. Nygaard, James J. Seashore and E. J. Brewer which have been marked as exhibits 287 through 291. I understand now, Mr. Anderson, you are offering the entire depositions?

Mr. Anderson: Right.

Mr. Field: Now, in connection with those depositions and as we have previously stated in compliance with pre-trial order number 3, we have stated specifically the portions of the depositions to which we have objections and the general grounds for it. I was wondering if our statement in that regard could be furnished to the reporter to be included in the record and the Judge, of course, will have it as a part of the record.

The document I have in mind is labeled "Otter Tail's Compliance with Paragraphs 4(a) and 4(b) of pre-trial order number 3." This is generally covered on pages 4 through 7 inclusive. At that time plaintiff was only offering certain portions of them and we, the first part of that material objects to that. That is no longer applicable because counsel is now offering the entire depositions, and then we entered objections to the portions thereof that related to general areas we have already discussed in the main anyway, [T. I, 102] two major ones being political and campaign material, and, too, litigation, and also the remoteness in point of time and some on the basis of general immateriality. Now that specific portions therefore that are so objected to are already stated in the memorandum form, in that document, and I presume in line with Your Honor's suggestion as to the Muller deposition that that memorandum could suffice for the moment as to state our positions as to portions of the depositions that we object to.

I wonder if that document is available to the Court?

The Court: I think I have it. Plaintiffs compliance with paragraph 4 of pre-trial order 3, is that it?

Mr. Field: Yes. On page 5 you see if that is the right one, page 5 of that document.

The Court: I guess I don't have that.

(Document handed to the Court.)

The Court: And your statement is that this instrument may be received as a statement of your objections?

Mr. Field: Yes. Perhaps it could be incorporated in the record.

The Court: That's fine with me.

[T. I, 103] Mr. Field: Then the memorandum would be before the Court as to the material.

The Court: All right.

Mr. Field: Could the objections start, if you want to follow this, Mr. Anderson, on page 4, the second paragraph on the bottom of the page it says, "Defendant will object," change that now to read Defendant objects to the proposed evidence and so forth and continuing on through page 7?

Mr. Anderson: All right.

Mr. Field: I will hand the reporter an extra copy of this document and if that is satisfactory it can be copied in the record.

Mr. Anderson: All right.

(The following contains the material just above-described.)

"Defendant objects to proposed evidence in the area of Political and Campaign Material generally upon the grounds of materiality, and, more specifically, that such evidence is inadmissible under the *Noerr*, *Pennington*, and related decisions, under which activities of this kind are completely immunized from the application of the antitrust laws. A more complete statement of our position in this regard is contained in our Trial Brief of pages 35-37.

[T. I, 104] Defendant will object to the admissibility of the proposed testimony with reference to the area of litigation generally upon the grounds of materiality, and, more specifically, upon the grounds that each particular case was individually brought, presented and tried in the Courts on the merits

of the determination of legitimate fact and legal issues, and the presentation and trial of each of said cases was in the proper exercise of the constitutional rights of the parties having free access to the Courts of the land, which fundamental rights are protected by the Bill of Rights. Our position as to the inadmissibility of this area of evidence is more particularly stated in our Trial Brief on pages 37-39a.

The particular portions of these respective depositions which contain proposed evidence relating to these two areas, and also two other general areas which will be objected to, are delineated as follows:

ALBERT V. HARTL DEPOSITION

*Political and Campaign Material*

P. 77, l. 5 to p. 78, l. 18
P. 96, l. 7 to p. 100, l. 20
P. 105, l. 2 to p. 109, l. 25
P. 111, l. 19 to p. 113, l. 4
P. 151, l. 8 to p. 154, l. 8
[T. I, 105]
P. 185, l. 9 to p. 186, l. 2
P. 208, l. 17 to p. 209, l. 7
P. 212, l. 21 to p. 213, l. 13
P. 261, l. 15 to p. 262, l. 24
P. 273, l. 25 to p. 274, l. 16
P. 284, l. 10 to p. 285, l. 2

*Litigation*

P. 159, l. 6 to p. 169, l. 6
P. 180, l. 8 to p. 185, l. 7
P. 233, l. 6 to p. 234, l. 16
P. 271, l. 25 to p. 273, l. 24
P. 275, l. 17 to p. 278, l. 15

*Remote in Point of Time as Well as Immaterial and Inadmissible Under the Pleadings*

P. 185, l. 9 to p. 187, l. 8
P. 211, l. 17 to p. 212, l. 19
P. 212, l. 21 to p. 213, l. 13
P. 216, l. 16 to p. 218, l. 23
P. 219, l. 4 to p. 220, l. 10
P. 230, l. 8 to p. 232, l. 9
P. 232, l. 10 to p. 240, l. 2
P. 242, l. 3 to p. 246, l. 19
P. 246, l. 20 to p. 249, l. 6
P. 260, l. 20 to p. 261, l. 14
P. 275, l. 5 to p. 276, l. 10
[T. I, 106]

*Generally Immaterial and/or Without Foundation*

P. 28, l. 12 to p. 35, l. 13
P. 35, l. 14 to p. 39, l. 25
P. 52, l. 11 to p. 54, l. 20
P. 63, l. 10 to p. 68, l. 2
P. 169, l. 9 through 18

WARREN K. NYE DEPOSITION

*Remote in Point of Time as Well as Immaterial and Inadmissible Under the Pleadings*

P. 3, l. 10 to p. 4, l. 7
P. 6, l. 6 to p. 8, l. 21
P. 8, l. 22 to p. 11, l. 4

JAMES J. SEASHORE DEPOSITION

*Political and Campaign Material*

P. 9, l. 1 to p. 16, l. 13

P. 18, l. 13 to p. 20, l. 17

P. 22, l. 11 to p. 26, l. 15

ROBERT W. NYGARD DEPOSITION

*Political and Campaign Material*

P. 2, l. 18 to p. 3, l. 14

P. 21, l. 5 to p. 25, l. 20

P. 26, l. 7 through 13

P. 27, l. 15 to p. 28, l. 17

P. 28, l. 18 to p. 29, l. 23

P. 33, l. 10 to p. 35, l. 15

[T. I, 107]

*Litigation*

P. 35, l. 16 to p. 36, l. 16

*Generally Immaterial and/or Without Foundation*

P. 4, l. 10 to p. 7, l. 25

P. J. BREWER DEPOSITION

*Political and Campaign Material*

P. 2, l. 20 to p. 3. l. 21

P. 17, l. 7 to p. 19, l. 16

*Litigation*

P. 5, l. 9 to p. 8, l. 9

P. 14, l. 2 to p. 17, l. 6

P. 21, l. 17 to p. 22, l. 10."

Mr. Field: I think we are down to the last one, Exhibit 294. I guess we don't have your original number for that. We can't locate it.

Mr. Anderson: 256.

Mr. Field: We have no objection to Exhibit 294.

Thank you for Your Honor's patience; I believe that completes the list.

The Court: All the exhibits GX-1 through GX-294 may be received subject to your objection for those, objections which

you have made based on hearsay, where one of the parties is not going to testify, and in those [T. I, 108] instances where you think you think the evidence may be prejudicial. If you will submit to me a list of those I will consider them in making a decision and if they appear to me to be prejudicial I will not consider them. I have to have a systematic way of knowing those which you think are prejudicial.

(GX Exhibits 1 through 294 received in evidence.)

The Court: Next witness, Counsel.

Mr. Anderson: If I might have just a moment to clear away the debris here.

One thing that we are going to do if it meets with your approval, Your Honor, and may be of assistance to people reading the record, we will prepare a list for each of these depositions which will have to be a cross index as between the deposition exhibits and whatever exhibits have been marked as GX exhibits. I would like to call—

Mr. Field: Mr. Anderson, I am sorry, a detail escaped me that I didn't mention.

Mr. Anderson: Sure.

Mr. Field; That is corrections in the depositions. I suggested some in the Hartl, Nye, et cetera, depositions which you have a copy and you suggested some in the Muller deposition. We haven't had time to make our suggestions as to Muller yet. Should there be some understanding of a submission of corrections in those depositions?

[T. I, 109] Mr. Anderson: We have no objection whatsoever to any of the proposed corrections you have given us for the Hartl, Nye, Seashore, Nygaard and Brewer depositions, and I presume we can have an understanding with respect to any other proposed corrections that we make in Muller.

Mr. Field: We will check ours out and let you know.

Mr. Anderson: I would like to call Mr. Harland Martinson if I may.

Whereupon,

## HARLAND MARTINSON,

the witness called by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

By Mr. Anderson:

Q. Mr. Martinson, would you give us your address, please?

A. Elbow Lake, Minnesota.

Q. Give us your present occupation?

A. I am city clerk and secretary of the Power Commission.

Q. How long have you been city clerk, Mr. Martinson?

A. Since 1962.

Q. And would you describe very briefly for us your [T. I, 110] function as city clerk?

A. I keep all the village financial records and minute books and all village files.

Q. You say minute books. Are you referring to the minutes of the council meetings?

A. That's right.

Mr. Anderson: I would like to have marked as GX Exhibit 295 a seven-page exhibit which consists of what purport to minutes of a council meeting in Elbow Lake in September of 1952 and some attached documents.

(GX 295 marked for identification.)

By Mr. Anderson:

Mr. Martinson, I would like to show you a document which has been marked GX-295 and ask you to take a look at it if you will.

A. Yes. These copies were taken from the minutes of the Village of Elbow Lake.

Q. Mr. Martinson, did you personally make the copy of the minutes?

A. Yes, I made them at your request.

Q. Yes.

A. I made copies at your request.

Q. And GX-295 is an accurate reflection of the minute book?

A. Yes.

[T. I, 111] Mr. Anderson: I offer GX-295, Your Honor.

(GX-295 offered in evidence.)

Mr. Field: May I ask a question or two?

The Court: You may.

Mr. Field: Mr. Martinson, this Exhibit 295 refers to a resolution of a problem between Otter Tail Power Company in Elbow Lake that preceded the year 1952, that's correct, isn't it?

The Witness: That's correct.

Mr. Field: And subsequent or simultaneous therewith the Village of Elbow Lake entered into a contract with Otter Tail Power Company for service and issued a franchise to it for the succeeding ten years approximately, is that substantially correct?

The Witness: Eight years I believe is the right period of time.

Mr. Field: I see. In any event, it represents a resolution of a previous problem?

The Witness: Yes. It was a settlement at that time.

Mr. Field: Yes.

The Witness: Between the village and the power company.

[T. I, 112] Mr. Field: We object to it, Your Honor, on the ground it's remote in point of time and relates to a prob-

lem that was resolved and has no relation to any issue in the trial of this case.

The Court: It's authentic, no question of its authenticity?

Mr. Field: No, I don't.

The Court: It may be received.

(GX-295 received in evidence.)

The Court: Any further questions?

Mr. Anderson: I now would like to have marked as GX Exhibit 296 a multi-page excerpt, what purports to be a multi-page excerpt from the minute books of Elbow Lake, runs from the period, and it doesn't include every meeting, but generally encompasses the period June 6, 1960 up through May of 1965.

(GX-296 marked for identification.)

By Mr. Anderson:

Q. Mr. Martinson, I place before you GX-296 and ask you to take a look at it. Do you recognize that batch of documents?

A. These are pages out of the village of Elbow Lake minute book.

Q. Did you make the copies?

A. Yes, I did.

[T. I, 113] Q. Are those accurate copies of the—

A. Yes.

Q. —minute book?

Mr. Anderson: I offer GX-296, Your Honor.

(GX-296 offered in evidence.)

Mr. Field: May I ask a few questions with reference to this?

The Court: You may.

Mr. Field: These exhibits start June 6, 1960 in point of time and the last one of them is dated in May of 1965. They don't include all the minutes of the council in between those two dates, do they?

The Witness: No, they do not.

Mr. Field: And further than that, they do not include all of the minutes of the council relating to this municipal power problem in Elbow Lake during this period?

The Witness: Yes, I believe they do.

Mr. Field: May I see the document that's offered? To refresh your memory, I am handing you the Exhibit 296 as it's offered in evidence.

The first document is dated June 6, 1960 and the next document is dated August 17, 1961.

[T. I, 114] I presume I better have these marked so I'll know what they are.

(Defendant's Exhibits 1 and 2 marked for identification.)

Mr. Field: I hand you two copies or two pages marked Defendant's Exhibits 1 and 2 which appear to be from the minutes of the village council of Elbow Lake, Exhibit 1 being dated August 7, 1961 and Exhibit 2 being dated I guess there is more than one day on a page. The first item is August 17, 1961 and the last one is August 23, 1961.

First, they appear also to be excerpts from the village minutes?

The Witness: Yes, they do.

[T. I, 115] By Mr. Field:

Q. You probably prepared those, too?

A. Very likely. I don't recall.

Q. Well, they do contain some reference, each of them, to this municipal power problem, don't they?

A. This one refers to something with regard to the power issue, but there was no action taken, no full council action taken.

Q. You are referring to Exhibit 1, and it does refer to the problem itself, does it not?

A. Yes, it refers to some people being at the meeting, but there was no action taken by the council one way or another.

Q. Let me read it, for example, quoting from Exhibit 1:

"Fifteen people, with Harold and Lorain Mohagen acting as spokesman, wanted to know if the village council intended to accept the Whiteway offered by Otter Tail Power Co. They stated that they felt that the council should accept this Whiteway and that they should also sign a franchise and contract with the power company. Mr. Martinson, acting mayor, informed the group that no definite action would be taken until the entire council was present."

That refers to the problem, doesn't it?

A. Yes.

Q. Now, look at Exhibit 2. There is some reference to this power problem there, too?

[T. I, 116] A. Yes, this refers to the attendance of a meeting by Mr. MacKichan, explaining their engineering service, and by Mr. Thompson of the Bureau of Reclamation about the Bureau of Reclamation, and Mr. Ewalt of Moody and Springsted explaining their services as a bonding consultant.

Mr. Anderson: Your Honor, during this pause in the action, might I ask a question?

I was told this morning by Mr. Field that there is a possibility we won't be in session on Friday, and I just thought I would check that with you.

The Court: I don't think that we will meet on Thursday afternoon.

Mr. Anderson: But we will on Friday?

The Court: I think so. I will advise you.

If we don't have the whole record, why don't we put in these other meetings?

Mr. Anderson: That is all right.

The Court: They may be received.

Any further questions of this witness?

Mr. Field: Yes, Your Honor.

The Court: Why don't we receive them? Do you want them marked?

By Mr. Field:

Q. I will hand you these papers marked as Exhibits 3, [T. I, 117] 4 and 5. They appear also to be copies from your minute book, do they not?

A. Yes.

Q. And will you look at each one and tell us if there is some reference to this municipal problem in the minutes?

The Court: On your representation that there is, those exhibits may be received.

Does that complete the record?

(Defendant's 3, 4 and 5 offered and received in evidence.)

The Witness: Yes, with reference to municipal power; no action by the council in any of them.

By Mr. Field:

Q. You prepared these exhibits, too, didn't you?

A. I don't recall if I did. These are from some other file?

Q. You are asking me. I can tell you, if I may, that they came from the files of the plaintiff and me along with the same exhibits that were previously identified.

Mr. Field: Now, with reference to the exhibits themselves, Your Honor, now that we have at least a more complete set over this period of time, we admit their authenticity, foundation. We object to them upon the grounds that they are details that have no purpose in the case, we having agreed that the council took action, had an [T. I, 118] election, built a plant, and all that, and these are just—

The Court: They may be received.

Any further questions of the witness?

Mr. Field: I have no more.

Mr. Anderson: I have a few questions, if I may.

The Court: All right.

By Mr. Anderson:

Q. Now, Mr. Martinson, do you recall the election on the municipal power issue in the early 1960s?

A. Yes.

Q. That was when, about? Approximately when did that happen? When was the election? Do you recall the year?

A. January, 1962, I believe.

The Court: A little louder, please.

The Witness: January, 1962, I believe that is the correct date.

By Mr. Anderson:

Q. Now, at the time that that election was held, Mr. Martinson, did Elbow Lake contemplate building its own generator?

A. Not unless necessary.

The Court: I guess I didn't hear [T. I, 119] your question.

By Mr. Anderson:

Q. Did Elbow Lake contemplate building its own generator?

A. Not unless there wasn't any other source available, of power available.

Q. What about the ballot?

A. The ballot called for enough bonds to build a generation and distribution system.

Q. Subsequent to that election in January of 1962, did Elbow Lake endeavor to locate sources of allocation of power?

A. Yes, we applied to the Bureau of Reclamation for an allocation of power.

Q. Did Elbow Lake ultimately construct its own generator?

A. Yes.

Q. Why did it do that?

A. It was unable to obtain power from any other source.

Mr. Anderson: I would like to mark as GX-297 a letter which purports to be from Mr. Martinson to Mr. Ed Wolter of United Power Association, dated July 8, 1965. It bears the identification symbol GX-159 in the upper right-hand corner.

While we are marking things, I would [T. I, 120] like to have marked as GX-298, a letter from Mr. Wolter to Mr. Martinson, dated August 10, 1965. It bears the identification symbol GX-162 in the upper right-hand corner.

By Mr. Anderson:

Q. Mr. Martinson, I place before you GX-297 and GX-298, and ask you to take a look at them.

Looking first at 297, can you tell me whether that is your signature on that document?

A. Yes, it is.

Q. And can you tell me whether you sent this document to Mr. Wolter?

A. Yes, I did.

Q. Now, looking at GX-298, can you tell me whether you received a copy of that document?

A. Yes, this is a copy of a letter I received from Mr. Wolter.

Q. Did you place both of these documents in the official files of the town?

A. Yes, I did.

Mr. Anderson: I offer the two documents, Your Honor.

(GX-297 and GX-298 offered in evidence.)

Mr. Field: We will want to cross-examine generally as to the subject matter, but I presume [T. I, 121] that can come in connection with general cross-examination of the witness.

The Court: They may be received.

(GX-297 and GX-298 received in evidence.)

By Mr. Anderson:

Q. Now, in Elbow Lake's endeavor to locate a source of power supply, did Elbow Lake inquire of Basin Electric as to whether Basin Electric would be willing to sell power to the town?

A. Yes, we did.

Q. What did Basin Electric tell you?

A. Basin told us they would deliver all our needs over the Bureau allocation or supply our entire needs through the Bureau substation at Morris, Minnesota.

Q. How would the power be delivered from the Bureau substation at Morris to Elbow Lake?

Mr. Field: Is this something that is in writing? Is he relating a conversation with somebody?

Mr. Anderson: I am just asking him. You can ask him that.

Mr. Field: I object to it, to the conversation as hearsay.

The Court: I don't know whether [T. I, 122] it is or not. I am not sure I understand the situation. Who is he writing to, where and when?

Mr. Anderson: Maybe I should start over again.

By Mr. Anderson:

Q. In your endeavor to locate a source of power, did you make inquiry of Basin Electric as to whether Basin Electric would be willing to sell you power?

A. Yes, we did.

Q. Approximately when did you do that?

A. I can't recall right now.

Q. Do you recall the year?

A. No, I don't.

Q. I show you this document and ask you if it refreshes your recollection as to that point?

Mr. Field: Is this an exhibit?

Mr. Anderson: No, it is not. It is marked as GX-168, but it's not an exhibit.

Mr. Field: May I see it?

The Witness: Some time prior to May 3, 1967, we requested Basin to sell us our power needs.

By Mr. Anderson:

Q. You did it by letter?

A. Yes.

Q. What was Basin's reply?

[T. I, 123] Mr. Field: We object to this. If there is a letter on it—

The Court: Sustained. Do you have some letter that tells about it?

Mr. Anderson: We only have one letter. We don't have both sides of the correspondence. I thought we would ask a few questions about it and let it go at that.

The Court: I will sustain the objection.

Next question.

By Mr. Anderson:

Q. Did Elbow Lake ask Otter Tail Power Company whether it would wheel power supplied by Basin Electric from the Morris substation to Elbow Lake?

A. Yes.

Q. What was Otter Tail's reply?

Mr. Field: Is that in writing, too?

The Court: You admit that you wouldn't do it, don't you? Is that any problem?

Mr. Field: This Basin matter—

The Court: You wouldn't wheel power anyway, isn't that admitted?

Mr. Field: That is correct, Your Honor. I was interested in the Basin relationship, though.

The Court: You may answer the question.

[T. I, 124] The Witness: They refused to wheel it.

By Mr. Anderson:

Q. Now, did the town of Elbow Lake retain an engineering firm to make a feasibility study, a study of the feasibility of municipal power?

A. Yes.

Q. What was the name of the engineering firm?

A. K. B. MacKichan & Associates.

Q. Did MacKichan supply a report to the town of Elbow Lake?

A. Yes.

Mr. Anderson: I would like to have marked as GX-299 a multi-paged document which purports to be an electric power cost study for the Village of Elbow Lake, prepared by K. B. MacKichan & Associates.

The Court: Haven't you numbered all these exhibits?

Mr. Anderson: We numbered them—

The Court: Shouldn't they all be renumbered.

Mr. Anderson: They were numbered, Your Honor, but as we went through them last week and threw out a lot of things, we had to renumber the things. That list there is a renumbering, that list I gave you this morning.

[T. I, 125] The Court: Well, how do we avoid having the reporter mark these exhibits?

Mr. Anderson: There won't be too many more.

The Court: How do we avoid having him do it so that they are all numbered?

Mr. Anderson: This evening perhaps we can prepare something which will parallel what we did for the first 294, and tomorrow morning we can come in with that prepared.

The Court: You will have them all numbered?

Mr. Anderson: Yes, and all ready to go.

By Mr. Anderson:

Q. Mr. Martinson, I place before you GX-299, and ask you to take a look at it. Is that the feasibility report that the town was supplied with by K. B. MacKichan and Associates?

A. Yes, that is correct.

Q. Did the town base its decision to proceed with the municipal power project upon that report?

A. Yes.

Mr. Anderson: I will offer that report, Your Honor.

[T. I, 126] (GX-299 offered in evidence.)

The Court: Is there objection?

Mr. Field: We have no objection. We will cross-examine on it.

The Court: It may be received.

(GX-299 received in evidence.)

The Court: Any further questions?

Mr. Anderson: That is all I have, Your Honor.

The Court: Why couldn't you have written that information out by stipulation that you have so far elicited from him? There was no objection to any of these exhibits, was there? There was no objection to the minutes of the council.

Mr. Anderson: We did, Your Honor, last December make the effort to do that. We prepared a big thick thing of proposed stipulation of facts, and we also had a lot of other

stipulations as to documents, and both sides made a real genuine effort to go as far as we could by stipulation.

As you will recall, we gave it a pretty good whirl, but we didn't wrap the whole thing up by stipulation.

The Court: You may examine.

[T. I, 127]

## CROSS-EXAMINATION

By Mr. Field:

Q. Mr. Martinson, you have been a city official and have been personally interested in this municipal power project in Elbow Lake from its start?

A. That is correct.

Q. Perhaps it would be fair for me to state that you have been an enthusiastic supporter of the municipal power project?

A. That is correct.

Q. And would you agree with this statement, that the reasons for you or Elbow Lake being interested in a municipal power project did not include any dissatisfaction with the service of the Otter Tail Power Company at Elbow Lake?

A. No, I don't believe anybody has ever claimed that.

Q. The service of Otter Tail was adequate and sufficient?

A. Correct.

Q. And would you also agree that the level of rates which Otter Tail was charging the Village of Elbow Lake was not the motivating reason for you supporting or other supporters in Elbow Lake proposing a municipal plant?

A. No, it was not.

Q. In fact, one of the minutes that you have [T. I, 128] identified here as an exhibit provides for putting into effect

precisely the same rates for the municipal plant that Otter Tail was charging?

A. That is correct.

Q. And that was done, wasn't it?

A. That is right.

Q. Would it be fair to say that the motivating principle, motivating reason for you and others supporting the municipal power project in Elbow Lake was the anticipation of making profits from the operation of the municipal plant to relieve the tax burden in the town?

A. Tax relief and economic growth for our city were the main reasons, yes.

Q. You dropped your voice and I have trouble hearing you over here.

A. Tax relief and economic growth for our village were the main reasons, I believe.

[T. I, 129] Q. Well, my question was, wasn't anticipated profits from the operation of the municipal plant a motivating factor?

A. Yes, it was.

Q. In fact, that was the principal motivating factor, wasn't it, Mr. Martinson?

A. One of them, yes.

Q. This feasibility study or report from MacKichan and Associates which is Exhibit 299 that you have just identified projects substantial profits to be made by the operation of a proposed municipal system, does it not?

A. I couldn't tell you the figures right now. I haven't looked at that for quite a number of months.

Q. Well, generally, you remember enough about it to know that it projected substantial profits, don't you, Mr. Martinson?

A. It projected profits, yes.

The Court: How is all this going to help us?

Mr. Field: Well, I think, Your Honor, if I may state it this way, that is the claim or at least a part of the position of the government here that the reason for municipal plants be agitated on Otter Tail's system is the fact that their service wasn't adequate and their rates were too high.

The Court: Even if they said that [T. I, 130] what difference does it make?

Mr. Field: We deny it. We want to meet it.

The Court: That would be all right if you were in a campaign up there in Otter Tail County or somewhere, but we are only concerned here with whether or not Otter Tail's been operating a monopoly to the prejudice, isn't that all we are concerned with here? The merits or demerits of public ownership aren't involved or whether its good or bad to own a plant or whether Otter Tail was doing a good job. If we went to all that we will be here until Christmas or shortly after, I suggest.

Mr. Field: If its conceded service and rates are not an issue—

The Court: Is it disputed, counsel?

Mr. Anderson: I don't dispute it with respect to Elbow Lake, but we could prove to the contrary with respect to other towns.

The Court: Is that pertinent?

Mr. Anderson: We think it is, Your Honor. For example, Colman—

The Court: Are you going to present evidence of that?

Mr. Anderson: We have one letter [T. I, 131] in Colman we are going to introduce, offer.

The Court: But no such claim is made for Elbow Lake?

Mr. Anderson: No such claim for Elbow Lake, no.

The Court: Thank you, counsel. Are there any questions on any other subject?

Mr. Field: On that particular thing, if they don't concede generally that issue is not in the case we think we are entitled to present evidence generally on it.

The Court: You so concede?

Mr. Anderson: I won't concede it generally, no. I will concede it with respect to Elbow Lake. I will concede there was no—that rates and service were not a principal motivating factor in the development of interest in a municipal power system in Elbow Lake.

The Court: Are there any further questions of the witness?

Mr. Field: Yes, Your Honor. I still would like to present the position that if counsel claims that Otter Tail's service and rates are a factor in issue in this case at all that the fact that he selects a town here and there which he says illustrates the contrary shouldn't prevent us from proving that in other towns the [T. I, 132] facts are so and so. In other words, it's either an issue in the case or it isn't.

The Court: I don't see how it can be an issue in the case. You claim it's an issue?

Mr. Anderson: We already conceded the fact that he is trying to make with respect to Elbow Lake. We already conceded his point here.

Mr. Field: I am talking about the case generally.

The Court: Do you claim it's an issue in the case in general?

Mr. Anderson: In Colman—

The Court: Tell me how it is an issue on the monopoly question?

Mr. Anderson: Well, in Colman—

The Court: The City of Colman?

Mr. Anderson: The City of Colman as we hope to show you soon in, I think its July of 1959, Otter Tail sends a letter out announcing an increase in rates. On August 15 there was a meeting in town as reflected in the minutes of the town council at which there were a substantial number of people and they debated the question of the future of the town so far as electric power is concerned. Shortly thereafter, I think on August 26, 1969, the council says let's get an engineering firm to take a look at the [T. I, 133] possibility of municipal power.

I submit that in Colman the announcement of a rate increase, the fact the people in Colman had no state commission to turn to to give them any sort of a forum to debate this rate increase had a very pronounced effect in stimulating municipal power agitation in that town, and I think that's pertinent because as we see the case, people in a town like Colman have only two choices, either they accept the rate increase and as I understand it they don't even have—the council doesn't even have to act before the rate increase becomes effective, either they accept it—

The Court: But you are running around Robin Hood's barn. We are talking whether Otter Tail was running good or bad service at Elbow Lake.

Mr. Anderson: I conceded as far as Elbow Lake.

The Court: Mr. Field was saying you claim generally Otter Tail was not rendering adequate service. Do you claim that in any way?

Mr. Anderson: I think we can show—

The Court: Do you claim it?

Mr. Anderson: We claim it with respect to specific towns, not Elbow Lake.

[T. I, 134] The Court: Do you claim that has anything to do with the issue of alleged monopoly?

Mr. Anderson: We think it does.

The Court: That's what I asked you to tell me before. Tell me what it is, what it has to do with monopoly?

[T. I, 135] Mr. Anderson: We say that if the people in a town are dissatisfied with either rates or service and particularly in South Dakota and Minnesota, their only alternative is to explore municipal power. If they don't like the service or rates they are getting from Otter Tail Power Company, the only thing they can do is they complain to Otter Tail and hope to get some service from Otter Tail or set up a municipal power system, and when they try to set up a municipal power system they get—they meet very strong opposition, and we say in that sense it's relevant, Your Honor, because it shows why they started the whole thing.

The Court: I don't see the relevance in it. Do you claim it's relevant?

Mr. Field: Well, I say it's either in or out. It can't be selected.

The Court: I think it's out. Do you have any questions on any other aspect of his testimony?

By Mr. Field:

Q. Now, Mr. Martinson, the issue that was submitted to the electors at the election Mr. Anderson called your attention to on direct examination was the establishment of a municipal plant which included local generation by a local generating plant by Diesel engines, that's true, isn't it?

[T. I, 136] A. That's correct. Yes.

Q. Yes. So the plan as adopted and submitted to the voters provided for a source of power of your own, didn't it?

A. That is correct.

Q. Yes. And that's the way the plant has been operated since it was put into operation in July of 1966?

A. Yes. It had to by necessity.

Q. Whether by necessity or not, power has been supplied by local generation, that's true, isn't it?

A. That's right.

Q. That's the plan that was approved by the voters, isn't it?

A. That is correct.

Q. And then I understand that meanwhile the council or the power board—what's the name of the commission that operates the system there?

A. Power Commission.

Q. Power Commission. I understand that meanwhile the council or the Power Commission in Elbow Lake has been looking for ways and means of getting either Bureau of Reclamation power or Basin Electric Cooperative power to Elbow Lake?

A. That's correct.

Q. Basin Electric Cooperative is a Rural Electrification Administration cooperative, is it not?

[T. I, 137] A. That's right.

Q. Has its headquarters out in North Dakota?

A. Yes.

Q. Is a generating cooperative?

A. Yes, it is.

Q. And a transmission cooperative?

A. Yes.

Q. In addition to the avenues that counsel inquired about as to securing this source of power from either the Bureau of Reclamation or Basin Electric Cooperative, did the Power

Commission or the council also contact East River Electric Cooperative?

A. We had some contact with them. Mr. Canney came to one of our council meetings.

Q. I believe that's reflected in the exhibit identified here?

A. That's correct.

Q. And East River Electric Cooperative suggested the possibility of their constructing a line within six miles of Elbow Lake, did they not?

A. It was either six or nine miles, I don't remember exactly. It was close to Elbow Lake.

Q. I presume the reason that the Power Commission or the council was interested in securing power from the Bureau of Reclamation and/or from Basin Electric Cooperative was [T. I, 138] that the power would be cheaper, lower cost to the village than your own generation, is that true?

A. This is correct.

Q. Yes. How much cheaper?

A. I couldn't tell you. We never got into contract negotiations because we had no way of delivery.

Q. In general what was the rate in mills if you can express it that way of the low cost or cheap cost or how ever you want to call it, of Government power that you were trying to obtain from these sources?

A. If I recall correctly Basin's price was three and a half mills plus $1.10 per month demand—

Q. You dropped your voice on that last part, three mills?

A. 3.5 mills plus $1.10 per month peak demand.

Q. What did that work out as as a total approximate mills per hour?

A. I couldn't tell you, not right offhand.

Q. In the neighborhood of from five to seven mills?

A. I would say it would be somewhere in there.

Q. Yes. And what was the expected or quoted cost of Government power through the Bureau of Reclamation, the Department of the Interior, to Elbow Lake?

A. I believe it was almost identical outside of the peaking charge, I believe that's a dollar per peak demand.

[T. I, 139] Q. It worked out about the same as far as the level of cost is concerned?

A. Roughly about the same.

Q. As the Basin source?

A. Yes.

Q. Was this low cost Government power, if I can call it that for a descriptive word, the Bureau of Reclamation or from Basin that which you wanted Otter Tail to wheel to Elbow Lake?

A. Yes, we had requested them to wheel the same as they are at other towns in the area.

Q. That was the power you wanted them to wheel, isn't that right?

A. Yes.

Q. Now, during this period that is involved in this consideration of this problem as shown by the exhibits that you have identified here and the general subject matter covered in your direct testimony, you have personally been interested, have you not, in also going to other towns on the Otter Tail system and talking about possible municipal power systems in other towns?

A. We were invited to attend a council meeting at Hankinson and a public meeting at Velva, North Dakota.

Q. You did go?

A. Yes.

[T. I, 140] Q. And there were other towns, too, weren't there, Mr. Martinson, on the Otter Tail system?

A. Not that I visited. There are towns that have visited our village.

Q. What towns are those?

A. Wahpeton was over some years ago and Velva, some of the council members from Velva were there.

Q. Mr. Walwick, who is also on the Power Commission, I guess he is president of it, is he not?

A. That is correct.

Q. Gerald Walwick, he also has in your company or with your knowledge gone to other towns on Otter Tail's system in connection with encouraging or telling their side of the story for a municipal plant in other towns, isn't that true?

A. He attended the same two towns that I did that were just noted.

Q. So that you know from your own activities and from activities that have come to your knowledge that other towns on Otter Tail's system are following the Elbow Lake project, looking towards it in connection with their consideration of putting in a municipal plant, is that not true?

A. The two towns that I mentioned, neither one of them have gone municipal.

Q. I am sorry?

A. Neither one of them have gone municipal.

[T. I, 141] Q. That wasn't my question. When this thing was being considered and during the period you have testified about, you were conscious of the fact and took some activity in connection with it, that other towns on Otter Tail's system were watching Elbow Lake in connection with considering a municipal plant, isn't that true?

A. Yes, I am sure it must be. I might add, too, we also had inquiries from Alabama.

The Court: Well, I guess it is about time for us to quit. I guess what happened here this afternoon is what we talked about before. We are getting a flushing out of your case but kind of reliving this public versus private power situation.

It naturally comes out. I hope these other witnesses whom you call, you will have that in mind.

Do you have any more municipal officials like this?

Mr. Anderson: We have three others, Your Honor.

The Court: Is there a need to call those people? Do you have some exhibits that you want to introduce through them? Won't Mr. Field stipulate to those exhibits?

Mr. Anderson: I have not asked Mr. Field that.

[T. I, 142] The Court: Why don't you show them to him tonight.

Mr. Anderson: Okay.

The Court: It seems to me that we waste a lot of time. It's the natural thing to do to bring all these things out.

Mr. Anderson: Yes, we will do that.

Our direct examination of the remaining three town officials is going to be as short or shorter than was our examination of him.

The Court: It isn't so much what you do but what you necessarily inspire Mr. Field to do in order to adequately represent his client. If you have just exhibits, why don't you show them to Mr. Field.

Mr. Anderson: I will.

The Court: I suggest that you not call those others, and I am sure Mr. Field, if you satisfy him the exhibits are authentic, that will satisfy him as to foundation and I will have to determine their relevancy.

Mr. Anderson: I will do that.

Would I be out of line if I made another plea regarding questions of the relevance of rates?

The Court: You mean adequacy of service?

Mr. Anderson: Yes, essentially that.

[T. I, 143] The Court: Maybe in the morning or some other fresh time you can do that.

Mr. Anderson: That is fine.

The Court: We will see you all—

The Witness: Your Honor, are you through with me?

The Court: I am. Are you fellows through with this witness?

Mr. Anderson: I have nothing further. I think Mr. Field has a few more questions of the witness.

The Witness: I have to stay over unless it is necessary.

The Court: This gentleman would like to get back home.

Mr. Field: We have a few more questions.

The Court: How many more? Are they appurtenant to our inquiry here, Mr. Field?

Mr. Field: I hope so. I think they are, Your Honor.

The Court: How many questions do you have? We want to accommodate this man. He wants to get back. Do you have two or three questions?

Mr. Field: I have been handed an exhibit that is in the correspondence that has been omitted [T. I, 144] at the moment.

The Court: In the interest of accommodating this gentleman from the country, shall we say three minutes' worth?

Mr. Field: I doubt it, but I will try.

The Court: Then shall we recess until 10:00 o'clock tomorrow morning?

Mr. Field: If you want to run late, I don't care about that.

The Witness: That is all right. I don't want to delay you. I can stay over.

The Court: See you in the morning, gentlemen.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m., June 2, 1971.)

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[T. II, 1]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

(Title Omitted in Printing)

The above entitled matter came on for trial before the Honorable Edward J. Devitt, Chief Judge of the above Court, at Saint Paul, Minnesota, on June 1, 1971.

The following contains the proceedings had on June 2, 1971.

(Appearances Omitted in Printing)

* * * * *

[T. II, 2] The Court: Good morning, gentlemen. I am sorry it's so warm in here all the time. The bailiff talks to the air conditioning fellow but it doesn't seem to help any.

Mr. Anderson: Your Honor, I discussed with Mr. Field and he says it's all right with him, Mr. Spethmann from Northern States Power Company—

The Court: Mr. Who?

Mr. Anderson: Mr. Spethmann has a date to testify up in the Capitol Building on some tax bill this morning and it's all

right with us and all right with Mr. Field if it is all right with you to call him first very quickly.

Mr. Field: Satisfactory.

Whereupon,

EDWARD C. SPETHMANN,

a witness called by and on behalf of the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Anderson:

Q. Mr. Spethmann, could you tell us what your job at Northern States Power is?

A. At the present time I am Vice-President of Public Affairs.

[T. II, 3] Q. Prior to that were you the Area Relations and Development Manager?

A. Yes, I was.

Q. What, very briefly, did that job encompass?

A. Area Relations Development covered primarily our contractual relationships with other power suppliers in the area, all types of power suppliers.

Q. Approximately how long were you in that job?

A. Approximately 15 years.

Q. When did you relinquish that job and move on to the vice-presidency?

A. I became a vice-president a year ago, however, the general functions of the department are still under my supervision.

Q. I have marked as the next four Government Exhibits, namely, Exhibits 300, 301, 302 and 303, four letters.

The Court: Have you seen those letters, Mr. Field?

Mr. Field: I am sure we have. I am looking at them again here.

The Court: Absent objection, they may be received, 300, 301, 302 and 303.

Mr. Field: I was looking at 302 and 303 again to see what they were. If Your Honor please, before they are received may I say this, we have no objection [T. II, 4] to the foundation for these exhibits. I am sure they were written by the parties indicated and sent to the parties to whom they are addressed.

Now, Exhibits 300 and 301, are Colman oriented letters and presumably might have some possible relevancy, at least plaintiff seems to think so. We have no objection to those exhibits.

The Court: To which two?

Mr. Field: 300 and 301.

The Court: They may be received.

(GX Exhibits 300 and 301 offered and received in evidence.)

The Court: You have objection to 302 and 303?

Mr. Field: Not as to foundation, but they relate to Alexandria which occurs to us to be outside the case.

The Court: They may be received. All exhibits may be received.

(GX Exhibits 302 and 303 offered and received in evidence.)

[T. II, 5] By Mr. Anderson:

Q. Turning to GX-301, you notice the second paragraph indicates, reads as follows, "Since your city is outside our service area," et cetera.

Would you define for me how NSP defines its service area as you use that phrase in GX-301?

A. Service area, as we interpret it, is an area where we have distribution power facilities to supply customers. We

have no distribution power facilities in the Colman area, and there are other suppliers in the area who do have.

Q. All you had in the Colman area was a transmission line—

A. About four or five miles away from Colman we have a through transmission line.

Q. Turning briefly to GX-303, you state, and I partially quote:

"There appears to be no basis for Northern States Power Company to consider entering into a bulk power wheeling contract with the City of Alexandria."

Would you explain what you meant by that language?

A. We have no facilities in the Alexandria area at all, either distribution or transmission facilities. Our closest would be, as I recall, some nine, ten miles away, and on this basis, since there are other power facilities in the area and all they were looking for is a wheeling agency, we thought we [T. II, 6] had no basis for negotiation.

Q. That is all I have. Thank you.

Mr. Field: We have no questions.

The Court: You may step down. We could have gotten along without him, I suggest.

Next witness.

(Witness excused.)

Mr. Anderson: That brings us back to Mr. Martinson, Your Honor.

Whereupon,

HARLAND MARTINSON,

having been previously sworn, resumed the stand and testified further as follows:

Mr. Field: May I say something in connection with yesterday's record, Your Honor?

The Muller deposition was offered and received, which I presume included exhibits that are included in the deposition; at least we made a record on your exhibits, but there was one exhibit marked Otter Tail Deposition Exhibit A that was part of our cross-examination of Mr. Muller, and that was not covered in yesterday's offer. We offer that as part of the Muller deposition.

(Otter Tail Deposition Exhibit A offered in evidence.)

Mr. Anderson: Well, I don't [T. II, 7] consider this to be something that is worthy of an awful lot of weight, Your Honor. It's a public relations handout prepared by the Army Corps of Engineers. I would very much like to have the opportunity to cross-examine the man who wrote this, but—

The Court: It may be received. I will try not to be misled by it.

(Otter Tail Deposition Exhibit A received in evidence.)

The Court: Do you have some questions?

Mr. Field: I used the exhibit in cross-examining Mr. Muller and he was familiar with it, but the deposition will show all those things.

Mr. Anderson: As you will recall yesterday at the end of the day, Your Honor, I threw myself on the mercy of the Court and asked to be given permission to very briefly address myself to the question of relevance of service and rates in the context of a monopoly case, and as I recall, you indicated it

might be better to wait until today until we were all fresh and take a fresh look at it.

With your permission, I would like to very briefly address myself to that point.

The Court: Is this witness going to deal with potential testimony about it?

[T. II, 8] Mr. Anderson: Mr. Field and I and you had a little discussion about this issue with respect to this witness yesterday.

The Court: All right. Go ahead.

Mr. Anderson: A classic byproduct of monopolies is control over price or rates and terms and conditions of service. The buyer has no alternative to accepting the rates and conditions of sale imposed by the seller monopolist.

Now, bringing this into the context of this case, we see that on occasion a retail municipal customer of Otter Tail became dissatisfied with an increase in rates. Then the towns, in an effort to break away from the monopolist's control over the rates, the towns endeavored to establish a new municipal power system. This, in turn, prompted the monopolist, namely, Otter Tail, to try in various ways to frustrate the development of a municipal system in order to maintain its monopoly position, thereby controlling and maintaining its control over rates.

That is why we say that we ought to be permitted in a very brief fashion to focus attention on that issue, and the only town that we propose to do it with, as I recall, two towns, Colman and Aurora.

The Court: I suppose that should permit Mr. Field, though, to show that Otter Tail has been [T. II, 9] rendering fine service every place else and maybe try to show that it's been good in those two places. Wouldn't we be getting off the track in

spending a lot of time on something that isn't really very important?

Mr. Anderson: (a) I don't think we will be getting off the track, and (b) I submit I don't believe we will find ourselves consuming an awful lot of time.

The Court: What were you reading from there?

Mr. Anderson: I just have a little thing that I scratched out in the hotel room last night.

The Court: Is there some authority for that or some cases or something? I have the impression that the idea of the point we are trying to get at here is whether Otter Tail was running a monopoly when it refused to wheel and sell at wholesale. Whether they were good or bad in rendering public service, the point is whether they are a monopolist, isn't it?

Mr. Anderson: That is the point, right.

In our judgment, one of the classical manifestations of a monopoly is control over rates. What happened in Colman was, as I indicated, they became dissatisfied with the rates and they wanted to try to break [T. II, 10] away from the existing monopoly. They tried to do that.

The Court: Is Colman in South Dakota?

Mr. Anderson: Yes.

The Court: Is there a state regulation of—

Mr. Anderson: No.

The Court: The same thing is true of Minnesota, there is no state regulation. Can't we take judicial notice of the fact that there is no agency in either of those states fixing rates?

Mr. Anderson: Well, yes.

The Court: Doesn't common knowledge tell us that they can charge what they will, what the traffic will bear?

Mr. Anderson: Yes, I think so, but I think it is helpful here in the record to show that at least in a couple of towns

where there was agitation, the thing which prompted it in substantial part was dissatisfaction with the rate structure.

The Court: I take a rather jaundice view of it. It's largely from the point that it detracts from our mission. When we come to Colman—do you want to cross-examine him, Mr. Field?

Mr. Field: Yes, I do, Your Honor, [T. II, 11] on some other subject matter. I am frank to say that if this matter of rates and service is going to be an issue in the case, I think it is oriented in part through the motivating forces for desires for municipal profits for those interested in a new municipal project to seek to set up a municipal project. If that is involved in the case, I would like to pursue that. As to Elbow Lake, yesterday you indicated I should switch subject matters, and I did. If that is the case—

[T. II, 12] The Court: Well, it isn't in the case now, but he is so ardent about wanting to bring it in that I hate to summarily say no. Get me some authority on it. There must be some cases on it.

Mr. Anderson: Yes, we will, Your Honor.

The Court: In the meantime we will say it's out of the case unless you get some additional verve about it and some authority too. You want to go ahead?

Mr. Field: In the meantime Mr. Martinson will be home.

The Court: He said yesterday service was good and rates were all right and everything was well lit up there in Elbow Lake. The gist of his testimony was they rendered fine services, I think he said.

Mr. Field: I realize that, but the motivating factor of making profits was something I didn't complete.

The Court: Well, if we take a different view we can bring Mr. Martinson back to the cities. It's out of it now.

Mr. Field: The rates and service and so on are out of it now?

The Court: Yes.

[T. II, 13] Mr. Anderson: Yesterday when I was examining Mr. Martinson we had a little difficulty in our examination of him concerning his efforts to get power from Basin Electric. The problem was that I was unable at that point to find the letters we were talking about. I found them last night and with the Court's permission I would like to mark these letters and I think that would clarify that particular part of the record.

I would like to offer three more exhibits, GX 304, 305 and 306. These three exhibits are correspondence between Elbow Lake and Basin Electric Cooperative.

(GX Exhibits 304, 305 and 306 offered in evidence.)

The Court: Absent objection, they may be received.

Mr. Field: Can I have the numbers as they are marked here in court?

Mr. Anderson: That's all I have, Your Honor.

Mr. Field: Your Honor, we have no objections to 304, 305 and 306.

The Court: They may be received.

(GX Exhibits 304, 305 and 306 received in evidence.)

[T. II, 14] Mr. Field: May I have marked a letter as Defendant's Exhibit 6.

(Defendant's Exhibit 6 marked for identification.)

## CROSS-EXAMINATION
(Continued)

By Mr. Field:

Q. I hand you Defendant's Exhibit 6 and ask you if you

recognize that as a letter that the Village of Elbow Lake Power Commission received which is in answer to Exhibit 305?

A. Yes.

Mr. Field: We offer Defendant's Exhibit 6 as a part of the cross-examination of the witness.

(Defendant's Exhibit 6 offered in evidence. )

The Court: Absent objection, it may be received.

Mr. Anderson: No objection.

The Court: It may be received.

(Defendant's Exhibit 6 received in evidence.)

By Mr. Field:

Q. Now, referring to Defendant's Exhibit 6 which, for Your Honor's following the testimony, is a letter from Mr. Nye to the Village of Elbow Lake Power Commission dated May 11, 1967. That refers to a proceeding before the [T. II, 15] Federal Power Commission. I say that just to orient you for the next question. You recognize that, do you?

A. Yes.

Q. When Otter Tail Power Company declined to furnish its facilities to wheel this Government power that we talked about yesterday to Elbow Lake and declined to serve the village at wholesale after your plant was set up or before and after the plant was set up, the Village of Elbow Lake did start a proceeding before the Federal Power Commission asking the Federal Power Commission to order Otter Tail to do those two things, in substance that's true, isn't it?

A. Yes. That's correct.

Q. And that proceeding is still pending before the Federal Power Commission?

A. Yes. It is not completed yet.

Q. In the course of that proceeding, the Federal Power Commission at the request of a motion of the Village of Elbow

Lake entered what has been called an order providing for a short term or an emergency interconnection, are you familiar with that?

A. Yes.

Q. And pursuant to that order the Village of Elbow Lake has constructed a transmission line from the generating plant of Elbow Lake to a point on the Otter Tail Power Company 41,600 transmission line?

[T. II, 16] A. This has been constructed now, yes.

Q. The right of the Village of Elbow Lake to this short term interconnection under the Order of the Federal Power Commission has existed so it could be taken advantage of since the fall of 1968, hasn't it?

A. The Order was there but being there was pending the litigation we could not sell our bonds to construct the transmission substation.

Q. Let's take one thing at a time. The Order of the Federal Power Commission was entered and that provided for the short term interconnection, so the right was there as far as the Order was concerned, that's true, is it not?

A. If we had the cash, yes.

Q. Well, you seem to beg the question a little bit. The Order was there, you had the right to do it?

A. Yes.

Q. Yes. What Otter Tail Power Company was ordered to do was permit Elbow Lake to make the interconnection, that's the substance of it, isn't it?

A. That's correct, yes.

Q. By litigation you are not referring to any injunction from any court that prevented you, the Village of Elbow Lake, from exercising the rights under that Order, are you?

A. No.

[T. II, 17] Q. What you are referring to there was an appeal to the Circuit Court of Appeals and then to the Supreme Court of the United States?

A. That's right.

Q. From that Order?

A. That's correct.

Q. That's what you are talking about?

A. Yes.

Q. Now, you say the village is now constructing that line for that short term interconnection under that Order?

A. That is correct.

Q. The line itself has been constructed, hasn't it, the transmission line part of it?

A. The line part, yes.

Q. The poles are there and wires are there?

A. The poles and the wire.

Q. And the interconnection facilities involved among other things a substation, do they not?

A. Yes.

Q. Substation to be located adjacent to Elbow Lake's generating plant?

A. That's correct.

Q. And the equipment for the substation has been ordered, has it?

A. Yes.

[T. II, 18] Q. And the transformer that's to go into that substation, what is the voltage capacity of it?

A. I believe that's a two-step transformer, 65,000—41-6 converted to 2400.

Q. What was the first part of your answer, 65?

A. 65,000, 41,600 and down to 2400.

Q. Well, so that we understand what you are saying, the facilities in the transformer would operate, either transform it from 65,000 volts down to distribution level or step it down from 41,600 volts down to distribution level?

A. That's correct.

Q. The equipment would do both of those things?

A. Yes.

Q. Now, oriented with the source of power area of this case, the 41,600 ability of your substation equipment is related to the source of power from Otter Tail Power Company, is it not?

A. That's correct.

Q. And the portion of the substation equipment that permits it, that provides for the stepping down of the voltage from 65,000 to distribution voltage, is related to the supply from East River Cooperative, isn't it?

A. No. That's not correct. The reason the 65,000 step was put in was for resale value. When the load of the village exceeds the transformer we have, it's [T. II, 19] resaleable. A 41-6-2400 is not resaleable.

Q. Let me ask this question. By coincidence or otherwise that is the voltage of the proposed plan, the transmission of East River Electric Cooperative that would enter the area of Elbow Lake, is it not?

A. I haven't any idea.

Q. I see. Well, you have had contact with East River Electric Cooperative as a source of power, haven't you?

A. Not for some time now.

Q. Well, you have had?

A. Oh, yes.

Q. Yes. And those plans involved or those contacts involved acquiring knowledge as to where the transmission line

of East River Electric Cooperative would run, generally speaking, didn't it?

A. That's correct.

Q. Yesterday you said that was some eight or nine miles away from Elbow Lake?

A. Yes.

Q. I suggested six or seven. That would be directly west of Elbow Lake, wouldn't it?

A. As I understood the question.

Q. Didn't your contacts include acquiring the information that their line would be what engineers apparently call 69 kv voltage?

[T. II, 20] A. I don't recall that.

Q. I see. In any event, I guess we are clear on this that the transformer equipment that Elbow Lake is acquiring will take a source of power either at 41,600 or 65,000 volts as you called it?

A. That's right.

Mr. Field: May we have marked as Defendant's Exhibits in connection with the cross-examination of this witness two other letters.

(Defendant's Exhibits 7 and 8 marked for identification.)

By Mr. Field:

Q. Now, Mr. Martinson, there has been offered by plaintiff and received in evidence this morning three letters, Exhibits 304, 305 and 306, that relate to contacts with the Basin Electric Power Cooperative. I show them to you and ask you if you recognize them as such, just as a basis for another question?

A. Yes.

Q. Then I will show you these exhibits which have been marked Defendant's Exhibits 7 and 8 and ask you if they

aren't two other letters that are related to the same area, that is, Basin Electric Power Cooperative as a source of power?

A. Yes.

[T. II, 21] Q. In fact, Exhibits 7 and 8 are addressed to you and presumably received by you?

A. That's correct.

Mr. Field: We offer Defendant's Exhibits 7 and 8 as part of the cross-examination of the witness.

(Defendant's Exhibits 7 and 8 offered in evidence.)

The Court: They may be received absent objection.

Mr. Anderson: No objection.

The Court: They may be received.

(Defendant's Exhibits 7 and 8 received in evidence.)

By Mr. Field:

Q. Now, Basin Electric Power Cooperative, I believe we identified yesterday is an REA-financed Rural Electric Cooperative with its base in North Dakota, do you recall that?

A. That's correct.

Q. Yes. The Village of Elbow Lake in connection with this matter has become a member of Basin Electric Power Cooperative, has it not?

A. No.

Q. Well, let me check the minutes that have been [T. II, 22] received in evidence for a minute.

Mr. Field: May we have a minute, Your Honor?

The Court: You may.

[T. II, 23] Perhaps I can go on to something else and my helpers can look for this in the meantime, if that is permissible.

By Mr. Field:

Q. Had the Village of Elbow Lake applied for membership to Basin Electric?

A. No.

Q. As you see it, your contacts with them have been looking for a source of power?

A. That is correct.

Q. And Basin Electric Power Cooperative is a potential source of power? At least so far as Basin is concerned, they will furnish it to you?

A. That is correct, if the labor is available, of course.

Q. Well, Basin will, and I use that as an abbreviation, Basin Electric Power Cooperative will furnish it to you, to Elbow Lake, if Elbow Lake can arrange for whatever transmission is necessary to get it there, isn't that true?

A. Yes. As I testified yesterday, they would deliver it to the Bureau substation at Morris.

Q. Basin Electric Power Cooperative is willing to furnish the power?

A. That is correct.

Q. That is also true of the Bureau of Reclamation, isn't it?

[T. II, 24] A. That is correct.

Q. You have applied to the Bureau of Reclamation for an allotment of power and have secured it?

A. That is right.

Q. And still have it?

A. We still have the allocation, yes.

Q. Now, in connection with the same subject matter, I will ask you if the Village of Elbow Lake is a member of the Missouri Basin Power Agency, if I have the name right?

A. Missouri Basin Municipal Power Agency, yes.

Q. That organization is a group of municipalities in Iowa and Minnesota and perhaps other states?

A. That's right.

Q. Its membership is composed of municipalities that have or desire municipal power systems of their own?

A. They all have their own municipal systems, yes.

Q. Just for identification in our thinking, that is the organization of which Mr. Verrips is one of the officers?

A. He is general manager, I believe, yes.

Q. General manager. And that agency, the Missouri Basin Power Agency actually intervened as a party in the Elbow Lake-Federal Power Commission proceeding, did it not?

A. That is right.

Q. And presented testimony? You were there at the hearing?

[T. II, 25] A. No, I was not. I was at one hearing but I wasn't at the last one.

Q. Well, you are familiar with the fact that they presented testimony of a means of delivering power to Elbow Lake?

A. I know that they testified there, yes.

Q. And one of the sources or means of giving government power or agency power, or whatever, to Elbow Lake was an independent transmission line? You are familiar with that, aren't you?

A. Just for the Village of Elbow Lake?

Q. Well, we will start out there.

A. No. I am not familiar with that.

Q. It's called an independent transmission line, and Mr. Mayben, a consulting engineer from R. W. Beck and Company testified?

A. No, I wasn't there when he testified.

Q. Do you know Mr. Mayben?

A. Yes.

Q. He is in the same organization that Mr. Trommershausen is who we will listen to next week, is he not?

A. Yes, R. W. Beck and Associates.

The Court: What was that answer?

The Witness: R. W. Beck and Associates.

[T. II, 26] By Mr. Field:

Q. Your answer to my question as to the plan of the agency through their witness to deliver power to Elbow Lake via independent transmission line indicated there was some plan that you were familiar with that was testified to, and was that a proposed planning of a grid for municipalities which would serve not only Elbow Lake but other municipalities?

A. This had been talked of by them. I don't know if it was testified there at that hearing, because I wasn't there.

Q. That is one of the studies or plans that are under consideration? That is true, isn't it?

A. I don't know.

Q. Aren't you familiar with the fact that the plan has been suggested? You said a minute ago that you were aware of it?

A. I know that the agency is building a line in Iowa, but I am not familiar with anything in Minnesota.

The Court: Cy, if you stand down here he will talk down here and the reporter can hear better. I think he is having a little trouble hearing.

The Witness: I am sorry, Your Honor. I can talk louder.

By Mr. Field:

Q. I will ask you this. You recognize the possibility [T. II, 27] of either an independent transmission line or a grid planned by some such organization as the Missouri Basin Power Agency as being a method of a source of power delivery to Elbow Lake?

A. It's a possibility, yes.

Q. Aren't you willing to concede this much, that both of those possibilities have been and are being given consideration by the agency?

A. Yes.

Q. Of which you are a member, of which Elbow Lake is a member?

A. Yes.

Mr. Field: If I may have a moment, if the Court please, I think we are about through with this witness.

We are still checking on the subject matter. If Mr. Martinson will be in the courtroom and if we find something, we can call him back. Otherwise, we are through. We can do that this morning.

The Court: You may step down. Next Witness.

Mr. Anderson: I have only one final question on redirect.

## REDIRECT EXAMINATION

By Mr. Anderson:

Q. Did the East River Power Cooperative ever build a [T. II, 28] transmission line approximate to Elbow Lake?

A. No.

Mr. Anderson: That is all I have, Your Honor.

The Court: You may step down.

(Witness excused.)

The Court: I have been re-reading your opening statement, Mr. Anderson. I see you have in mind, or you did have in mind calling three others from Hankinson and Colman and Aurora, principally to introduce exhibits, letters or something. Why don't you show those to Mr. Field? Maybe he will just stipulate that the foundation is okay.

Mr. Anderson: Last night, Your Honor, we did give Mr. Field a list of exhibits that we intended to introduce through these witnesses.

The Court: Why don't you give them to him and maybe you won't have to call those witnesses.

Mr. Anderson: He has copies of all of them.

The Court: Why don't you offer them and see if he objects to them. I would think he would be cooperative about that.

Mr. Field: We will try to be. I don't think there will be any question about foundations. [T. II, 29] There may be some subject matter that we may want to cross-examine about.

We have your list here, all right. Perhaps you would like to mark them as exhibits.

Mr. Anderson: Right. Maybe it would facilitate things if I just put the next witness, Mr. Lewis, on the stand. I will mark the exhibits and we can decide what to do with them. Then if Mr. Field has any questions, he can ask his questions.

The Court: Is he one of the four?

Mr. Anderson: Yes. Mr. Hubert Lewis, Jr.

Whereupon,

HUBERT LEWIS, JR.,

a witness called by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Mr. Anderson: I have here four exhibits which in order will be GX-307, -308, 309 and 310. I will show them to Mr. Field so he can get them in the proper sequence.

The Court: Why don't you give them the exhibits for the next one, too, and we will take a recess of 10 minutes.

We will recess, Mr. Bailiff.

(Recess taken.)

[T. II, 30] The Court: We won't meet tomorrow afternoon, gentlemen. I suggest we start at 9:30 and terminate about 11:30 without surcease.

Let's see, we don't need this witness now, do we, as a result of the visits?

Mr. Anderson: I have no questions of him. I have four documents. I have decided to abandon my right, my interest in the rate structure. I will not offer the document concerning that. I have four others, 307, 308, 309 and 310 that represents the sum and substance of my direct examination of this witness.

The Court: The exhibits may be received then, absent objection.

Mr. Field: Exhibit 307, Your Honor, has been furnished to us and appears to be a contract for electric service between the Bureau of Reclamation and the City of Colman and we have no objection to that exhibit.

Exhibit 308 we do object to. It refers to some litigation and the fact that certain acts of counsel was due to that. It's a prejudicial statement. We object to it.

Exhibit 309 is the engineer's report of Buell and Winter Engineering Company who made what I guess we have been calling a feasibility study or at least a report on a proposed municipal project. We have generally [T. II, 31] been taking the position that they weren't admissible lacking the engineer that prepared them so we can question him about it, and we make that same objection here. I realize Your Honor has taken a different tack on these exhibits, but I think we should make our record on it.

Perhaps what I have said is sufficient for that purpose?

The Court: I think so.

Mr. Field: Exhibit 310 appears to be a multi-paged voluminous document of copies of minutes of the City Council of Colman starting in, I believe April 14, 1958; and the last one, the last page being dated November 3, 1965, which presumably are intended to include the minutes relating to this municipal power project during that interval of time, and we have taken the position generally here that we stipulated to the end result of the village's or the city's action and the decision and the election, the construction of the plant. We thought these details were unnecessary to complicate the record and we make the same observation here as the form of objection.

The Court: I think they are unnecessary, but counsel seems to feel better to have them all in here although you have stipulated.

These exhibits may be received, 307 through 310.

[T. II, 32] (GX Exhibits 307 thru 310 received in evidence.)

Mr. Field: Now having these exhibits before us sponsored by this witness, I feel it my duty to ask the witness some questions with reference to the contents of some of them, if I may.

The Court: Yes.

## CROSS-EXAMINATION

By Mr. Field:

Q. Mr. Lewis, you are the present mayor of Colman, South Dakota, are you?

A. Yes.

Q. You have to answer up so the gentleman can hear you.

A. Yes.

Q. And I believe if my memory serves me, these records show that during the time involved in the processing of this problem as shown by these exhibits, you were the city auditor, am I right, sir?

A. Yes, sir.

Q. So you have been familiar as an officer of the village council during this entire period with this matter of municipal power?

A. I believe so.

Q. And I believe these exhibits show, I suppose you [T. II, 33] are familiar with the fact that as far as source of power is concerned for the City of Colman, there was a source of power readily available for Colman?

A. Otter Tail Power was there.

Q. What's that?

A. Otter Tail Power Company was in there.

Q. Well, they were there serving at retail, of course?

A. Yes.

Q. They have been ousted so they aren't there any more, that's true, isn't it?

A. Yes.

Q. They were ousted as of the time you started up the municipal plant that the city put in?

A. Yes.

Q. Yes.

A. We don't have a plant, it's wheeled from the Bureau.

Q. Well, I will put the question more properly. Otter Tail Power's service was ousted as of the time you started operation of your municipal system?

A. Yes.

Q. Yes. Now, my question which was poorly worded a few minutes ago was directed towards this, a source of power for

your new municipal system that was put in was readily available to the City of Colman, wasn't it?

[T. II, 34] A. Yes.

Q. Yes. And that source of power as shown I believe by these exhibits included the Bureau of Reclamation?

A. Yes.

Q. And also the Sioux Valley Empire Electrical Cooperative?

A. I don't know about Sioux Valley. We have the Bureau.

Q. Well, isn't Sioux Valley Electric Cooperative the immediate source of delivery of power to your municipal system?

A. Their office is right outside of town.

Q. I realize the cooperative has its home office at Colman.

A. Yes.

Q. Yes. Mr. Haugen, the mayor, was office manager of the Sioux Valley while these things were going on?

A. No. He was maintenance man.

Q. Maintenance man?

A. Yes.

Q. I see. What I am getting at is, isn't it the Sioux Valley Empire Electrical Association electrical lines that are adjacent to Colman over which the Bureau power comes and is delivered into your system?

A. Yes.

[T. II, 35] Q. Yes. So that there never was any problem of source of power as far as Colman is concerned for your new municipal system, was there?

A. I don't believe so.

Q. No. And as it was planned and as it's actually being used, the Bureau of Reclamation has made an allotment of power to the City of Colman?

A. Yes.

Q. And it is delivered to your system via the lines of Sioux Valley Empire Electrical Association?

A. Yes.

Q. Is East River Electric Cooperative a part of that function too or not as far as you know?

A. Yes.

Q. It is. I see.

A. They are a substation, I believe it is.

Q. I'm sorry.

A. East River to Sioux Valley is a substation, I believe it is.

[T. II, 36] Q. So the source of power for Colman, then—I had better back up and get it right—is initially the allotment of power from the Bureau of Reclamation?

A. Yes.

Q. Then it comes over the lines of the East River C. ›er-ative, and, in turn, over the lines of the Sioux Valley Electric Cooperative and then delivered to the system of Colman?

A. Yes.

Mr. Field: While this witness is on the stand, Your Honor, for clarity in the record, I understand the matter of Otter Tail's service and rates are still out?

The Court: Still out.

Mr. Field: Otherwise, I could inquire of him about the subject matter.

Without transgressing that ruling, may I inquire—I will ask a question and see if it meets with the Court's approval, as far as the questian is concerned.

By Mr. Field:

Q. I will ask you this. Is it not true that the potential of making profits by the operation of the proposed new munic-

ipal system in Colman was one of the major motivating factors involved in promoting the project?

Mr. Anderson: Your Honor, if that [T. II, 37] question is to be permitted, then I would like the opportunity to have one more exhibit marked.

The Court: It seems to me that that is beyond the pall, too, of our mission. You have been a staunch advocate of that theory, I think, here.

Mr. Field: Well—

The Court: How good the service, whether municipal ownership is better than private ownership, and all that.

Mr. Field: Well, the reason I'm asking the question is this, assuming rates and service are out of the case, which Your Honor says they are, and that makes them out, so there is no problem there, the profit motive is a separate subject matter, as I see it, for the establishment of these municipal projects. It may overlap into the prospect of rate relief, and so forth, but it is, and I believe we can prove from these exhibits as well as, I hope, from asking this witness questions, that that was one of the major points in promoting the project, to make a profit so they could reduce the tax burden and so forth.

Mr. Anderson: Well, if we are going to involve ourselves in a discussion of motives, then I would like to offer a letter—

The Court: Do you think we should?

Mr. Anderson: This is really what [T. II, 38] I was talking about this morning in a real sense, motive. If we are going to get involved in a discussion of why they decided to go to explore the possibility of a municipal power system, then insofar as Colman is concerned, I would like to introduce this document which shows that just two weeks before the thrust toward municipal power really took off, they got a letter, the

town got a letter from Otter Tail announcing a rate increase. That is the only thing I was trying to show.

The Court: So you have been talking or had in mind all the time evidence of motive?

Mr. Anderson: Yes, really. Yes.

The Court: Is that material to our mission? You will remember the several nice visits we had about how we were all agreed, or at least I thought we were, that we really didn't want this to be a life-time mission for all of us, and we all looked at it practically and had the view that you can get kind of wrought up about this public versus private ownership, and we all agreed that we were going to stipulate to just about everything. I wonder if we are not departing from what I thought was a meeting of our minds about the whole thing?

If you want to introduce things like this, he would want to introduce things the other way, and we get into a philosophical debate, wouldn't we, basically?

Mr. Anderson: Yes. We had no [T. II, 39] intention and no interest in getting involved in a philosophical debate concerning the merits or demerits of public power and if Your Honor feels that our introducing this document would tend in that direction, then we won't offer it.

The Court: All right.

Mr. Anderson: But if Mr. Field is going to be permitted to ask the witness whether the potential for profit motivated the town in exploring the possibility as to a municipal power system, then in order to round out the record, I would like to show that there was another ingredient involved, namely, that they weren't too happy about the rate increase.

The Court: I will sustain the objection.

Do you have further questions of this witness, gentlemen?

Mr. Field: Just let me check, please.

The Court: Sure.

Mr. Field: We have nothing further.

I presume that my remarks as to what I thought I could prove might be in the record in the form of an offer of proof in cross-examination?

The Court: Yes, I will accept [T. II, 40] them that way. I think it's clear from our colloquy what my ruling is, so if I err, my superiors can observe it and take remedial action.

Mr. Field: I wasn't laying foundation for that, Your Honor. I was just trying to complete the record at this point.

We have nothing further of Mr. Lewis.

The Court: You may step down. Thank you, sir.

(Witness excused.)

Mr. Jaeger: The government will call Mr. Ernest Woytassek as its next witness.

Whereupon,

ERNEST WOYTASSEK,

a witness called by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Mr. Jaeger: We have seven documents to be marked as government exhibits in connection with Mr. Woytassek's testimony, and they are numbered Government Exhibits 311 through 317.

The Court: Absent objection, they may be received.

Mr. Field: Will you give us time, Your Honor?

[T. II, 41] The Court: Yes.

Mr. Field: Addressing myself to these proposed exhibits, Your Honor, Exhibit 311 appears to be copies of some minutes

of the city council of Hankinson, starting with 1958 and the last one is dated September 13, 1966. I am a little confused, because Exhibits 313, 314 and 315 are also apparently council minutes.

Are they duplications?

Mr. Jaeger: There is some slight duplication but they are additional minutes resolutions to the minutes marked as Government's Exhibit 311.

Mr. Field: 313, 314 and 315 are not entirely composed of minutes, then?

Mr. Jaeger: As I understand, they are composed of the minutes and any resolutions that were passed in connection with those minutes.

Mr. Field: Well, in addition to our standing objection to these minutes of council meetings in these towns as being unnecessary, in view of our stipulation of relevant facts, I comment in addition to that, Your Honor, that Exhibit 311 on the first page, and perhaps other places, too, the first page caught my eye, of course, contains a resolution with a whereas clause and contains self-serving statements on the problems we have just been talking about and upon which I suppose counsel will base arguments on [T. II, 42] rates and so forth. I don't know just what status these things will have. Council minutes, of course, have some official standing, but the fact that they recite their side of the case in the minutes calls upon me to object to their introduction, as they do represent self-serving statements and arguments, and some of it has been ruled out as not in the case.

[T. II, 43] The Court: Counsel, I invite your attention to the supplemental stipulation of facts, paragraphs 361 to 479, inclusive. They seem to cover to 471 inclusive, seem to

cover the whole story about Hankinson. What do these exhibits do which isn't covered by the stipulation?

Mr. Jaeger: Well, these flush out—

The Court: Flush out?

Mr. Jaeger: In a little more detail exactly what took place in Hankinson.

The Court: Is that the sole purpose?

Mr. Jaeger: Just, I think giving additional background and explaining the different dates and things on which things occurred, and I think these are important with respect to litigation and things of this type in terms of timing of litigation.

The Court: What does it tell us? What do the exhibits tell us that the stipulation does not, what essential facts? Anything?

Mr. Jaeger: Well, I think the main thing they give us, they set forth in chronological order the main things that happened in the city and they flush out the main stipulations that we made that you are referring to.

The Court: Well, I am content with [T. II, 44] just the bones of it. I am satisfied. I will sustain the objection. Anything more?

Mr. Anderson: We have already, if I may make a point, we have already put in minutes for this very reason in these other two towns. In our initial thrust in the stipulation, we had a rather detailed thing which did set forth the chronology. We were unable to reach agreement on that, and then we, in order to get something done, we accepted a very limited, very general stipulation which we really weren't all that happy with. We were hoping we had the opportunity to flush out that thing a little bit by using the minutes of these meetings to show what happened and when.

Now, to the extent that the minutes have references in them to dissatisfaction with rates and things like that, I will abide by Your Honor's ruling that we are not going to draw attention to that.

The Court: I guess there is no utilitarian purpose in this offer according to counsel's representation. The whole story is told in the stipulation.

Mr. Anderson: No. He said, he meant, as I understand it, he meant the minutes. He was talking about the minutes. That's the point.

The Court: I guess maybe he misunderstood my question. I invite your attention to the [T. II, 45] supplemental stipulation of facts consisting of many pages, pages 49 to 62, inclusive, tells the whole story about Hankinson. Now, my question is why do we need to learn more about Hankinson or more details? How will it help us?

Mr. Field: If Your Honor please, which document do you have there?

The Court: Supplemental Stipulation of Facts, Supplement No. 1, pages 49 through 62.

This is the Hankinson man? Aren't you Hankinson?

The Witness: Yes, Your Honor.

Mr. Anderson: I think you are referring to the one we prepared which was not—yes, that's the one.

Mr. Field: I don't think the document you are looking at is the right one to look at.

The Court: Did you agree on some other one about Hankinson?

Mr. Field: Yes, we did. I don't think that one is signed, is it?

Mr. Anderson: That is much narrower.

Mr. Field: That's a draft.

The Court: Oh, I see.

Mr. Anderson: That was the opening thrust. You remember—

[T. II, 46] The Court: Shall I throw that away then?

Mr. Anderson: Sorrowfully, yes. If we had been able to get that stipulation signed it would have been fine.

Mr. Field: But there is a stipulation.

The Court: Is that additional Supplemental 1 then? Does that deal with Hankinson?

Mr. Field: Yes. On page six it starts.

The Court: Page six. On this letter-size one?

Mr. Field: No. No.

The Court: Since expedition is the key here, I would be better off to say okay. You stated your objection. They may be received.

Do you have further questions of the witness, Counsel?

Mr. Jaeger: Yes, Your Honor, just a few short questions.

The Court: All right.

Mr. Field: I hadn't quite finished with my—

The Court: Objections?

Mr. Field: Objections. No.

[T. II, 47] What I commented on in my objections about the minutes which are in several of these documents, 311, 312, 313, 314 and 315; now Exhibit 316 is the engineer's or feasibility report for Hankinson of which we have been consistently objecting to on other towns on the grounds that the engineer who prepared the report is not in court subject to cross-examination and in connection with that objection I remark further that these reports contain many self-serving statements on the part of the engineer as to his conclusions or statements as to what other people have said and done and so forth. So they are full of hearsay and self-serving statements and we don't have

the man here to cross-examine with reference to it, if it's going to be pointed to on page so-and-so and so-and-so of an exhibit of this kind as the proof of the fact, well, we are embarrassed by not having the opportunity to question the gentleman who made the statement. It is a feasibility report that was made and received, we concede that.

Mr. Jaeger: Your Honor, I might just comment on that. We are not putting this report in for the truth of the statements, necessarily for the truth of the statements contained in them. It's being put in to show that a report was made and that this was the report and that this was the statements in the report that were made to the people in the town. I realize there may be [T. II, 48] some statements in there that Mr. Field disagrees with and we are not putting it in for that purpose.

Mr. Field: If you will delete that word, "necessarily," in your statement, I will accept it: Not necessarily put in for that purpose.

The Court: Would you delete that?

Mr. Jaeger: Yes. I will, Your Honor.

The Court: All right. I guess I have found what you referred to as the additional statement of facts Supplement No. 1.

Mr. Field: Yes.

The Court: Which is apparently signed by you and your opponent.

Mr. Field: Dated April 26, 1971.

The Court: And the Hankinson material is on page six of that, you say?

Mr. Field: It starts there, paragraph 15.

The Court: All right. That looks like a pretty good complete story about it, letters from the president. You think the whole story isn't told?

Mr. Anderson: No.

The Court: This is going to help us more?

[T. II, 49] Mr. Jaeger: Yes, Your Honor.

The Court: They may be received.

(GX Exhibits 311 through 316 received in evidence.)

The Court: Now, what are your two questions of him?

Mr. Jaeger: I think there is one more document, Your Honor.

Mr. Field: We have no objection to Exhibit 317, the letter from our office to Robert Nygaard.

The Court: The exhibit may be received.

(GX Exhibit 317 offered and received in evidence.)

The Court: Go ahead, Counsel.

## DIRECT EXAMINATION

By Mr. Jaeger:

Q. Mr. Woytassek, what is your present address?

A. Breckenridge, Minnesota.

Q. Prior to that time where did you live?

A. At Hankinson.

Q. How long did you live in Hankinson?

A. Since '53.

Q. Did you hold any elected position in the city government of Hankinson?

[T. II, 50] A. Yes. Term of four years as mayor.

Q. Generally what years did your term of mayor cover?

A. I believe that covered '42 - '46.

Q. You mean '62?

A. '62, I'm sorry.

Q. 1962 to 1966?

A. Yes.

Q. At the time you became mayor, did you and some other citizens of Hankinson consider the possibility of establishing a municipal electric system?

A. Shortly thereafter, yes.

Q. Now, would you briefly tell the Court how repairs and maintenance were generally prepared on the distribution system of Otter Tail prior to and during 1963?

A. Well, at the time we had one man stationed in Hankinson which served Lidgerwood and Hankinson, and if we had difficulties with the system he would send in a line crew for repair.

Mr. Field: It occurs to me, Your Honor, we must be getting into the subject matter Your Honor says is out.

The Court: Yes. I didn't hear you object though.

Mr. Field: I am objecting now that I hear what we are getting into.

[T. II, 51] The Court: Yes. Do you want to go into that?

Mr. Jaeger: Your Honor, this goes to the fact that some improvements were made by Otter Tail in its service to the town of Hankinson after the municipal agitation began in the town, and I guess in line with your rulings along the lines that we have been talking about that we can't go into that.

The Court: The answer may be stricken and the question is stricken. Do you have some other questions?

Mr. Jaeger: Yes. Just a couple more, Your Honor.

By Mr. Jaeger:

Q. During the period of roughly 1964, did the Otter Tail commence to do anything in the town that the city council felt necessary to bring up and discuss with Otter Tail?

Mr. Field: I am sorry. I can't hear that question.

The Court: Say it again for Mr. Field.

By Mr. Jaeger:

Q. During 1964 did Otter Tail commence to take any actions in the town of Hankinson that concerned the city council and which the city council talked to Otter Tail about?

[T. II, 52] A. Yes.

Mr. Field: That's so general I don't know what's coming. I don't know what subject matter we are getting into.

The Court: Well, we will both listen with attention then and see.

The Witness: They began replacing poles in the town.

Mr. Field: We move that be stricken. It's the same subject matter.

The Court: It sounds like dissatisfaction.

Mr. Jaeger: No, Your Honor.

The Court: Tell us what it is in a nutshell?

Mr. Jaeger: In a nutshell, Otter Tail began to put in some taller poles in the town of Hankinson which the city council felt were interfering with possible construction of the municipal electric system in the future if they were to build one and asked Otter Tail to stop doing that and that's what I am getting at. I don't think this goes to the rates and service thing.

The Court: What purpose do you want to serve by that tendered testimony?

Mr. Jaeger: Well, it shows another [T. II, 53] type of activity engaged in by Otter Tail to make it more difficult for the town of Hankinson to construct a municipal electric system if and when they decided to do it.

The Court: Might we have a little Donnybrook Farm about that, too, and get a lot of engineers from Otter Tail to tell how high they were and why they really did it? Would we be getting off the track?

Mr. Jaeger: Well, I think it's pertinent, Your Honor.

The Court: We will be trying a lot of little issues, won't we? I suppose they would come in with engineers and say we put up high poles every place or have some explanation for it, wouldn't they?

Mr. Jaeger: Well, the main purpose is to show that the activities that Otter Tail has used to try to stop the construction of municipal electric systems is not entirely limited to refusals to wheel and refusals to sell power wholesale. They have taken other actions in addition to that.

The Court: You allege any others in your Complaint?

Mr. Jaeger: I think the Complaint says it refuses to wheel, refuses to sell wholesale and says other activities, and we were served with an interrogatory by Mr. Field asking us to spell out in detail what other [T. II, 54] activities we were alleging and I think in answer to that—

The Court: You spell this out?

Mr. Jaeger: Yes. To Mr. Field. I believe we did in answer to his interrogatory.

Mr. Field: If the Court please, what counsel says about the interrogatories and their answers is substantially correct, I believe. That doesn't make it outside of the ruling of Your Honor, however, just because it's alleged.

What the position of Otter Tail will be on this matter that counsel suggests going into is that some 13 or 14 taller poles were required in order to render proper service in Hankinson due to some voltage conditions that developed. So there is a controversy about the situation. Our position is that the work was done to provide adequate service for the customers at that time, and we have evidence that will support that position. So we do get into an avenue of exploration, Your Honor, on the subject matter.

[T. II, 55] The Court: Of course, their theory is that this is evidence of another manifestation of monopoly.

Mr. Field: My helpers correct me as I go along here.

I have been corrected that there is nothing in the answers to our interrogatories with reference to taller poles in Hankinson.

Mr. Jaeger: I think there was a reference to taller poles, the same controversy in the City of Colman when we answered the interrogatories, and we did put it in as to reference to the City of Colman. We didn't find out about the same controversy occurring in Hankinson until we talked with the witness yesterday in preparing his testimony. But they were notified, at least, as to Colman, that the same type of controversy occurred in that town.

Mr. Field: This is the first notice we had that there is even a claim of any taller pole matter in Hankinson. This is the first time I have had notice of it.

The Court: It seems like minutiae to me. I will sustain the objection.

Do you have some other questions?

Mr. Jaeger: Yes, Your Honor, just a few.

[T. II, 56] By Mr. Jaeger:

Q. Mr. Woytassek, I would like you to look at the Government's Exhibit 317, which consists of a letter from Warren Nye of Otter Tail directed to Mr. Howard Braaten, Alderman of the City of Hankinson, dated October 15, 1963, and attached to it is a memorandum from Mr. Donoho to Robert Nygaard concerning the use of revenues from municipally owned utilities for other than utility purposes.

My question is whether you have ever seen that document before?

A. Yes, I have.

Q. Can you describe in what connection you saw that document?

A. A copy of this was sent to all of our aldermen at the time and to myself. It was circulated throughout Hankinson in a general sense. It was given to pro-Otter Tail people to circulate and show.

Q. What was the response of the city council after they received this document?

Mr. Field: Just a minute. Is this something in writing? I object to it. I don't know whether he is calling for hearsay or what he is doing.

The Court: I don't know what is coming either. Is there some resolution that the council prepared?

[T. II, 57] Mr. Jaeger: That is what I am asking him.

The Court: Is that in the record?

Mr. Jaeger: No, it isn't.

The Court: Do you have a record of what the council did?

Mr. Jaeger: It's not in the minutes.

The Court: Are the minutes lost, or something?

Mr. Jaeger: This is something not covered by the minutes, Your Honor, and this is why I am asking this line of questions. It's not covered in the minutes and I just wanted him—he was on the council at the time and received a copy of this.

If you want me to, I will rephrase the question and ask him what he personally did in response to receipt of this document.

Mr. Field: We would object to that. We still don't know whether he is calling for hearsay.

The Court: I don't know, either. Let's take a chance and see what the answer is.

Tell us, what did you do?

The Witness: I took this document to the city attorney and I asked him to get an opinion on the [T. II, 58] laws that are referred to in it from the North Dakota Attorney General's office.

By Mr. Jaeger:

Q. Was a response received from the State Attorney General's office?

A. Yes.

Q. Was it the same as what is set forth in that—

Mr. Field: We object to that as calling for a conclusion.

The Court: Sustained.

By Mr. Jaeger:

Q. Now, Mr. Woytassek, I would like you to look at Government's Exhibit 312, which is a copy of a resolution passed by the city council at Hankinson and the resolution refers to or makes a statement that the Bureau of Reclamation's nearest point of interconnection available to Hankinson is 39 miles away at Forman, North Dakota, and it further says that the city will request the Bureau of Reclamation to build a transmission line from the Forman substation to serve Hankinson.

Now, was such a request made to the Bureau of Reclamation?

A. Yes, it was.

Mr. Field: Just a minute. We object to that. If it is in writing, we should have it.

[T. II, 59] The Court: How do you know that?

The Witness: I was the mayor.

The Court: The answer may stand.

Next question.

By Mr. Jaeger:

Q. Do you recall what the response was to your request to the Bureau to build such a transmission line?

Mr. Field: Object to that upon the grounds—

The Court: Yes. Sustained.

Do you have letters or something to show that?

Mr. Jaeger: No, we don't Your Honor.

By Mr. Jaeger:

Q. One final question here. In 1966 when your term as mayor neared an end, did you seek re-election?

A. Yes.

Q. Was the municipal electric system an issue during the fight to get re-elected?

A. Very much so.

Mr. Field: I object to that.

The Court: Sustained.

Any further questions?

Mr. Jaeger: No further questions, [T. II, 60] Your Honor.

The Court: I gather that you were defeated, though, were you?

The Witness: Right.

The Court: Do you have cross-examination?

Mr. Field: I have some, yes.

## CROSS-EXAMINATION

By Mr. Field:

Q. Mr. Woytassek, would it be fair for me to say that you have been an active and aggressive promoter of the municipal power project in Hankinson?

A. Yes.

Q. In connection with that activity, you have contacted several other towns on the Otter Tail system receiving service from Otter Tail, have you not?

A. Yes. I would say directly or indirectly we have, yes.

Mr. Field: May I have marked as an exhibit this document, please?

Mr. Anderson: We don't have a copy of that and haven't—

Mr. Field: Do you want to look at it now?

Mr. Anderson: No. That is all [T. II, 61] right.

By Mr. Field:

Q. I will show you what has been marked as Defendant's Exhibit 9, and you can look at it and then tell us if you wrote and signed that letter.

A. Yes. I recognize it.

Q. That is your signature?

A. Yes.

Q. It relates to this municipal power matter, doesn't it?

A. It's in response to an inquiry, yes.

Q. In response to an inquiry from where?

A. From Carrington, North Dakota.

Q. That is one of the towns served by Otter Tail Power Company on the system, is it not?

A. I believe it is.

Q. I call your attention to part of this letter, and it refers to "We" and that being you, I suppose, as mayor, and the city, perhaps, used the assistance also of the City of Elbow Lake, Minnesota. So you had contact with Elbow Lake, too, I gather?

A. Yes, we did.

Q. Another part of the letter recites that the City of Oakes has met with us twice and are presently considering an election. So you had some contact with Oakes?

[T. II, 62] A. They came down on a couple of occasions.

Q. That is one of the towns served by the Otter Tail system, is it not?

A. Yes.

Q. Is Hankinson a member of the Basin Electric Cooperative?

A. I believe they were. I don't believe they are anymore.

Q. During your tour of duty as mayor, they did join Basin Electric Cooperative, didn't they?

A. Yes.

Q. There have been received in evidence here via some mass offering and receipt of exhibits, quite a good deal of campaign material received over our objection but oriented to that area of the case.

You took part, didn't you, in the campaign activities?

A. Yes.

Q. On this matter?

A. Yes.

Q. You recall, Exhibit 9 refers to advising Carrington to write various places, which includes the North Dakota Association of Rural Cooperatives and also the Basin Electric Power Cooperative? That is true, isn't it?

A. Yes.

Q. In this campaign that you participated in on [T. II, 63] municipal power in Hankinson, the cooperatives furnished some assistance to you promoters of the municipal project, didn't they?

A. We used some materials. We reproduced some of their letters and stuff they had written to us.

Q. What cooperatives furnished this help to you?

A. Well, I do remember specifically reproducing a letter from Mr. Ulmer, which is an association of cooperatives, as I understand it; it's an association of cooperatives.

Q. In connection with a source of power, consideration was given, wasn't it, to the construction of a transmission line to reach a point where you could obtain either Bureau power or Basin power or other cooperative power, government power?

A. It was discussed but deemed unfeasible.

Q. But it was discussed, wasn't it?

A. Yes.

Q. In connection with that consideration, was there an application made or some contact made with the First Western State Bank of Minot?

A. They expressed an interest in the purchase of our bonds.

Q. And did they express an interest also in financing the construction of a transmission line?

A. Not that I recall.

[T. II, 64] Q. I have in front of me a statement made in the trial involving the First Western State Bank of Minot and Barry R. McDaniel, and I guess you know what I am talking about—

Mr. Jaeger: Your Honor, I object to any question concerning the trial—

Mr. Field: I haven't finished the question yet.

May I finish the question?

The Court: Keep standing and maybe you can object when he finishes.

By Mr. Field:

Q. That the First Western State Bank of Minot made some payments to a group in Hankinson in connection with some of your political campaign material? Did they do that?

Mr. Jaeger: I object to that question, Your Honor. I don't think the First Western State Bank is on trial here, and I don't see the relevance.

The Court: Is that where some officers were charged with something recently in Minot?

Mr. Field: Yes.

The Court: It seems to me we are out of the bay now.

Mr. Field: I don't think we are.

The Court: I will sustain the objection.

[T. II, 65 By Mr. Field:

Q. Were there some payments from the cooperatives, either through one source or another, to assist in your campaign?

A. None that I am aware of.

Q. Is there some reservation in your mind about that when you say "none that I am aware of"? Do you have something in mind that you think some other member of the council is aware of?

A. Again, it goes back to your previous question on the bank, on that bank in Minot, or something. I am not familiar with that situation, but I have heard of it, and this is what I mean when I say that I am not aware of it. It's strictly hearsay to me. I am not familiar with it.

Q. I see. One further question. Is what you heard with reference to any financial assistance from the cooperatives in this campaign associated with the First State Bank of Minot?

Mr. Jaeger: Your Honor, I object to that question. He is asking for hearsay. The witness already said he doesn't have any personal knowledge of any of these matters and I don't think it serves any useful purpose to continue along this line of questioning.

The Court: Objection sustained.

[T. II, 66] By Mr. Field:

Q. Well, in general, Mr. Woytassek, the cooperatives were supporting the proponents of the municipal project in Hankinson, that's true, isn't it?

A. To a point, yes.

Q. Yes.

Mr. Field: Excuse me just a minute.

I have several documents I ask to have marked as exhibits.

(Defendant's Exhibits 10 through 15 marked for identification.)

Mr. Field: We have marked some documents Defendant's Exhibits 10 through 15 inclusive. I will show them now to Mr. Anderson. They also have your GX numbers on them, I believe.

In line with some of our procedures here, I offer Defendant's Exhibits 10 through 15 inclusive without pursuing the foundation.

(Defendant's Exhibits 10 through 15 offered in evidence.)

The Court: Absent objection they may be received.

Mr. Anderson: No objection.

The Court: They may be received.

(Defendant's Exhibits 10 through 15 received in evidence.)

[T. II, 67] By Mr. Field:

Q. Just one or two questions about these exhibits now that we have them in evidence and before us and perhaps you would like to look at Exhibits 13, 14 and 15. They are related. Then I will ask you a question about them.

Now, Exhibit 13 which, for chronology in the record, is a letter from Basin Electric Power Cooperative to Mayor Ernest Woytassek of the City of Hankinson, dated February 14, 1964. That enclosed, among other things, Exhibits 14 and 15, didn't it?

A. I would suspect it was possibly in the same envelope.

Q. Well, it's referred to in the letter, isn't it?

A. Yes. Yes, it is.

Q. Yes. And in addition to that you received a copy of an application for membership in Basin Electric?

A. Yes.

Q. And I presume it was in response to that that the city became a member of Basin that you have already told us about?

A. Yes.

Q. And calling your attention briefly to Defendant's Exhibit 12, you can review that so I can ask you a question about that?

A. All right.

[T. II, 68] Q. In substance, Exhibit 12 is the minutes of the City Council of Hankinson which authorizes, directs the mayor and auditor of Hankinson to sign the application for membership in Basin and attached to it is a copy of the application itself?

A. Yes.

Q. That was done, of course?

A. Yes.

Q. Now, did Hankinson also have some contacts with East River Electric Cooperative as a potential source of power?

A. I believe there were two or three telephone conversations with Mr. and Mrs. Hanlon, yes.

Mr. Field: That's all the questions we have, Your Honor.

Mr. Jaeger: I just have one question on redirect.

## REDIRECT EXAMINATION

By Mr. Jaeger:

Q. Mr. Woytassek, Mr. Field asked you about the towns, I believe they were Oakes and Carrington?

A. Yes.

Q. Do you know whether either of those towns ever had any election on the municipal power issue?

A. No. I don't know.

[T. II, 69] Mr. Jaeger: That's all, Your Honor.

The Court: What is in store for this afternoon now. We have another city representative?

Mr. Anderson: Yes. We have a Mrs. Waples who, with her husband, have been sitting around a couple of days and if it wouldn't be a great imposition on the Court, we have no questions for them. We could do that right now.

The Court: Why do you need to call them then?

Mr. Anderson: Our only purpose is to put in a few documents.

The Court: Why don't you give the documents to Mr. Field.

Mr. Anderson: He already has them.

Mr. Field: It's the same situation as to the other towns in my judgment.

The Court: Do you want to question them?

Mr. Field: Well, I guess I can't answer that standing here. We have all the documents but their importance as of this moment, whether I wish to cross-examine with reference to them, if you mark the documents we will give them consideration.

The Court: By 2:00 o'clock you will [T. II, 70] have a chance to see them?

Mr. Field: Oh, yes.

The Court: You show him what you want.

We will recess now until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m., June 2, 1971.)

[T. II, 71] June 2, 1971, 2:00 o'clock p.m.

Mr. Jaeger: Plaintiff calls Mrs. Elaine Waples.

Whereupon,

ELAINE WAPLES,

a witness called by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Mr. Field: If the Court please, before we get started, my attention has been called to the fact that I didn't formally offer Defendant's Exhibit 9.

The Court: It may be received, absent objection.

Mr. Anderson: No objection.

The Court: It may be received.

(Defendant's Exhibit 9 offered and received in evidence.)

Mr. Jaeger: We have no questions by way of oral testimony from Mrs. Waples, but we have a set of exhibits marked GX-318 through GX-329, which I will now hand to be marked.

The Court: Haven't they already been marked?

Mr. Jaeger: The originals haven't been, but—

[T. II, 72] The Court: Well, that is why we took the recess. Absent objection, they will be received.

Mr. Field: Give us time, Your Honor.

If the Court please, addressing myself to these exhibits, 318 is an unusually fat sheaf of minutes of the council of Aurora covering the period from some date in 1960 through some date in 1968. It is subject to the same comments that we have made with reference to other minutes. They, I assume, contain some self-serving statements and conclusions, and so forth, in connection with some of the matters that appear in this exhibit. I think we reached a satisfactory arrangement on the last batch as far as their not being offered as proof of the facts stated.

Am I wrong there?

Mr. Jaeger: Yes, I think you are. We made that statement with respect to the engineering reports, but the minutes,

in our view, are business records and they were kept by Mrs. Waples. Her name appears at the bottom of each of these, and she is here and available for cross-examination. We made no such statement with respect to the town council minutes.

Mr. Field: I am glad to be corrected on what statement you made, but I nevertheless—

The Court: What village are you [T. II, 73] from?

The Witness: Aurora.

Mr. Field: I make the observation and objection—I don't make objection on the ground of foundation, I think they are minutes, all right, kept by Mrs. Waples, but the mere fact that the council passes a resolution or it has whereas clauses in it, that doesn't prove the facts therein stated, and we object to it if it is offered for that purpose.

Now, Exhibits 319 and 320 are two engineering reports. I don't see the date of the first one.

Do you have that, counsel?

Mr. Jaeger: I don't think it is actually dated, although there is a reference in the first paragraph to an agreement reached on March 26, 1963, to produce the reports, and I think it was actually submitted some time subsequent to that date in 1963.

Mr. Field: Very well. We will assume that date is in 1963, Exhibit 319, the first report; the second report, Exhibit 320 is dated April 26, 1965. Now, I guess I am proper in suggesting that the same arrangement with reference to receipt of these engineering reports as far as their being offered as proof of the facts that are stated therein, that that would be appropriate.

[T. II, 74] Mr. Jaeger: Yes.

Mr. Field: With that understanding we have no objection to those two exhibits.

On Exhibits 321, 322, 323, 324, 325, 326, 327, 328, are all letters which make reference to the litigation in one form or another with some self-serving statements as to the nature or effect of the litigation and some respects some inferences or statements with reference to Otter Tail Power Company in connection therewith, and we object to them and each of them upon the grounds that they do contain self-serving statements with reference to those matters, and we would be obliged to cross-examine with reference to it if they are admitted.

The Court: What is it you want to prove other than what's in the stipulation?

Mr. Jaeger: Well, I think the documents that Mr. Field just referred to, go to the aspect of the effect that the litigation had upon the town of Aurora in its effort to establish a municipal electric system and the stipulation is silent as to that. We attempted to enter into a stipulation concerning litigation and both sides talked about it and we sent drafts back and forth between each other but we couldn't reach a final agreement on the wording of any stipulation of that type so that this group of documents goes to an explanation of [T. II, 75] the effects that the litigation had on the town of Aurora.

The Court: The exhibits may be received.

(GX Exhibits 318 through 328 received in evidence.)

The Court: You may examine.

Mr. Field: There is one more here that I didn't comment on. Exhibit 329 is a resolution referring to the granting of a franchise to Otter Tail Power Company back in 1951. We have no objection to it. I fail to see what the materiality is.

The Court: It may be received.

(GX Exhibit 329 received in evidence.)

## CROSS-EXAMINATION

By Mr. Field:

Q. Mrs. Waples, you are and have been the town clerk of Aurora, is that right?

A. For 20 years.

Q. For 20 years?

A. Yes.

Q. Now, some of these exhibits that have been received refer to litigation in connection with the municipal power matter in Aurora so I am going to ask you a few questions about them, and I will try to make them in layman's [T. II, 76] terms and in general and as briefly as possible.

If I state that one of the pieces of litigation was a lawsuit which questioned the right of the Village of Aurora to purchase its own revenue bonds, would you recognize that?

A. Yes.

Q. Is that a fair statement of what was involved?

A. That's true.

Q. In one case?

A. That's true.

Q. As a little background, the municipal power plant was going to be financed as planned and as submitted to the voters by the issuance of revenue bonds payable solely out of the earnings of the new municipal system, that's true, isn't it?

A. True.

Q. And at the time of this lawsuit that I described generally, —is it village or city that we talk about?

A. Town is what we refer to it as.

Q. The town of Aurora proposed to buy some of those revenue bonds themselves?

A. Yes.

Q. Out of other monies?

A. Yes.

Q. Raised by taxation?

[T. II, 77] A. No. No.

Q. At least other monies in the city treasury?

A. This would be surplus liquor funds.

Q. I see. In any event, from monies in the city treasury?

A. True.

Q. And the legality of the city doing that was involved in that case?

A. Yes.

Q. And the Court decided that it was not proper for the city to use those funds to buy its own revenue bonds?

A. Yes.

Q. That's true, isn't it?

A. Yes.

Q. Yes. Now, the other piece of litigation I will try to describe if I can, in a way that will be recognizable, involved what us lawyers call a mandamus proceeding to require the city to call an election; do you recognize that?

A. Yes.

Q. As a description of that other piece of litigation?

A. Yes.

Q. Is that right?

A. Yes.

Q. As background for discussing that, there had been filed with the town council a petition signed by a certain [T. II, 78] number of citizens of Aurora requesting that the town council call an election on that subject matter, is that true?

A. Yes.

Q. And the town council of Aurora declined to respond to that petition, in other words?

A. At that time.

Q. At that time. Yes. Then this mandamus proceeding was commenced that I have referred to, the general purpose of which was to require or compel the town council to respond to the petition and call the election?

A. Yes.

Q. Is that right?

A. Yes.

Q. And after that petition had been filed with the town council, the town council then did honor the petition and call the special election, is that a fair statement?

A. Yes. Right.

Q. Those are the two pieces of litigation that are referred to in these letters?

A. Yes.

Q. Aren't they?

A. Yes.

Q. Now, in the minutes of the town council, this thick document, Exhibit 318 here in court, I presume that covers generally the actions of the town council during the entire [T. II, 79] period, does it?

A. Portions.

Q. In considering that matter?

A. Portions, yes.

Q. Just the motions that are selected?

A. Well, these were made by me.

Q. I see.

A. They went through my records.

Q. Are they of the entire minutes for the period?

A. No.

Q. Or selective?

A. Selective.

Q. I see. Do they include all of the references to this municipal power plant project during the period?

A. I think, yes.

Q. I see. Now, among the things that are referred to in the minutes, perhaps some of the other exhibits too, is a source of power for the proposed municipal system in Aurora, isn't that true?

A. True.

Q. Yes. And the source of power for the proposed new municipal system in Aurora was from a cooperative, was it not?

A. No. Bureau of Reclamation.

Q. I see. Now, let me put it this way. The Bureau [T. II, 80] of Reclamation made an allotment to Aurora, did it?

A. Yes.

Q. Pursuant to the application of the town, of course?

A. Yes.

Q. And did that allotment of power, as it is referred to in these documents arrive at the municipal system in Aurora via a cooperative line?

A. Sioux Valley agreed to wheel power for us.

Q. That's Sioux Valley Electric Cooperative?

A. Yes.

Q. Or some such name?

A. Yes.

Q. And you entered, that is the town, entered into an agreement with Sioux Valley Cooperative for that purpose?

A. To wheel.

Q. Yes.

A. And then we pay maintenance charge too.

Q. What I was getting at was, the power originates from the Bureau of Reclamation?

A. Yes.

Q. It gets to the town of Aurora via the lines of, that is, wheeled over the lines of Sioux Valley Electric Cooperative?

A. Yes.

Q. Is East River Electric Cooperative involved in that [T. II, 81] setup?

A. Slightly. There is, I think, maybe a portion of a couple miles.

Q. I see.

A. Not much.

Q. They are a link in there somewhere?

A. Yes.

Q. So there are two cooperatives in between the Bureau of Reclamation?

A. Yes. Small portion.

Q. Yes. And the town of Aurora?

A. Yes.

[T. II, 82] Q. And in addition to the services of East River Cooperative and Sioux Valley Electric Cooperative in bringing the power to the new system in Aurora, Sioux Valley Electric Cooperative also performs other services in connection with the operation of the new municipal plant?

A. Services, yes; maintenance, I guess you would say.

Q. Let's see if I can summarize that fairly accurately, and if not, you tell me so.

Does the arrangement with Sioux Valley Electric Cooperative involve the cooperative maintaining the distribution system in Aurora?

A. Yes, any power outages or failure of any sort, we call Sioux Valley and then they send a crew to fix it.

Q. In substance, does that mean that they operate it for the town?

A. Well, there are service charges.

Q. Any problems in operations, they take care of those for you under this agreement?

A. Yes.

Q. What does the town do, if anything, in connection with the operation?

A. What do we do?

Q. Yes.

A. Well, we do the billing, do the collecting, take in the money, use the revenue for other improvements in town.

[T. II, 83] Q. As far as operations go, it's confined to the billing and collection, is that it?

A. Yes.

Q. The rest of the operation is handled by the cooperative for you under a contract?

A. Yes.

Mr. Field: May we have marked three documents for identification, please?

The Court: Absent objection, they may be received.

Mr. Anderson: No objection, Your Honor.

The Court: They may be received.

(Defendant's Exhibits 16, 17 and 18 offered and received in evidence.)

By Mr. Field:

Q. Just one or two questions about these exhibits. I guess Exhibit 16 is a contract between the City of Aurora and East River involving the part they play in the picture, isn't it?

A. Yes.

Q. And Exhibit 17 is the agreement between Sioux Valley Empire Electric Association and Aurora for the wheeling that you mentioned?

A. Yes.

[T. II, 84] Q. And Exhibit 18 is the agreement between Sioux Valley Electric Association, Incorporated, and the City of Aurora for the construction, operation and maintenance of the system which you mentioned?

A. Yes.

Q. These are the documents that provide for those services?

A. Right.

Q. My attention has been called to the fact, if it is a fact, at least from our examination of them, we have been unable to find the name of the engineering firm that submitted, prepared and submitted these engineering reports, Exhibits 319 and 320.

A. Smith and Sheen of Watertown, South Dakota.

Q. So we can understand, these two documents were prepared by that firm, then?

A. Yes.

Mr. Field: May I have this marked as an exhibit, please?

Mr. Jaeger: We haven't seen the documents before, but we don't have any objection to its admission into evidence.

The Court: It may be received.

(Defendant's Exhibit 19 offered and received in evidence.)

[T. II, 85] By Mr. Field:

Q. Just one or two questions that are prompted by this Exhibit 19. It is written by Sioux Valley to Smith and Sheen, the engineering firm that you just mentioned, and I suppose you would like to glance at it before I ask you a question about it.

The item that came to mind that I wanted to ask you about was the reference here on page 2 of the exhibit, and I will just quote a small portion of it, "With regard to maintenance of the system, Sioux Valley would be willing to accept the responsibility on the basis offered to Colman."

Then it goes on to discuss what the arrangement would be. I presume this is true, that the arrangement with Aurora is similar to the one with Colman?

A. Yes.

Q. And you were familiar with that situation?

A. Yes.

Q. And I presume that the arrangement that is mentioned here is the arrangement that you later contracted for and it's the written document we have already seen?

A. Yes.

Q. The delivery of power and the source of power and the arrangement for maintenance and operation in your town were quite comparable and parallel to Colman, then?

Mr. Anderson: I don't know how [T. II, 86] she can be expected to answer that.

Mr. Field: If she can't, all right.

The Witness: Our maintenance charges would not be as much as Colman.

By Mr. Field:

Q. Except for the amount of the charge, they would be comparable?

A. Yes.

[T. II, 87] Mr. Field: A couple more documents I would like to have marked, please.

(Defendant's Exhibits 20 and 21 marked for identification.)

Mr. Anderson: They are already in evidence. If those are not already in evidence we have no objection that they go in. We offered all the Muller exhibits and they are in evidence. If there is anything missing and it so happens those two are not in for some reason, we will have no objection to your putting them in tomorrow or whenever you want.

Mr. Field: Thank you for calling our attention to the fact they are in the Muller deposition and we would like to withdraw the identification of Defendant's Exhibits 20 and 21. They are already Muller Deposition Exhibits Numbers 39 and 44 and I have copies of those. If I can refer to them for a question or two and we won't get too much of this in the record.

Mr. Anderson: They are not only already Muller Deposition Exhibits but they are already exhibits admitted into evidence in this case.

Mr. Field: Renumbered?

Mr. Anderson: Renumbered.

Mr. Field: They are renumbered as 242 and 247?

[T. II, 88] Mr. Anderson: Yes.

Mr. Field: That's about as complicated as we can get with two pieces of paper anyway. I guess they are in evidence and I want to ask a question or two about them.

By Mr. Field:

Q. Everybody has seen them recently but you, so I guess we better let you look at them. Exhibit 247 is dated—I see it isn't dated.

Mr. Field: Can we establish the date?

Mr. Anderson: I think we did within the Muller deposition. I think we circumstantially placed the time during the course of that deposition.

Mr. Field: That wouldn't be too hard to look up, would it? The date is pertinent to whatever question I might ask about it. It's Muller Deposition Exhibit 44, if that helps locate it.

I will pursue this and maybe we will locate the date before we are through here.

By Mr. Field:

Q. It appears from the minutes, from your records which have been received in evidence and also from the stipulation that's been entered into that in connection with submitting to the voters the proposal of a new municipal system in Aurora there was an election held, the first one on [T. II, 89] September 10, 1968 and the second one May 18, 1965. In general do you recall there were two elections?

A. Yes.

Q. Now, prior to the 1968 election, here is where the date of this letter becomes pertinent, is it true the town was having difficulty in securing an allotment of power from the Bureau of Reclamation?

A. Yes.

Q. And 247 probably is evidence of that fact. In fact, it says that at the present time the Bureau is not receiving applications for power?

A. Yes.

Q. And in the 1968 election, the record shows, and this stipulation shows, and I presume you recall the voters did not approve the new system?

A. That's right.

Q. And then prior to this 1965 election the town was successful in getting an allocation of Bureau power?

A. Yes.

Q. And I presume Exhibit 242 is some evidence of that—

A. Yes.

Q. —procedure?

A. Yes.

Q. And then in the 1965 election the voters did approve the proposed new municipal system?

[T. II, 90] A. Yes.

Mr. Field: Did you find the date? It probably isn't too important now. I guess the examination is clear as to the date. It precedes the 1968 election in some respect. We have been unable to locate the date.

Mr. Anderson: I think that if you have reference to the minutes of the meeting you will find the date is reflected there. I am sure it's in there, so for purposes of writing the brief you will have it.

Mr. Field: That's all the questions we have, Your Honor.

Mr. Jaeger: No redirect, Your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Anderson: Mr. Ralph Bartel, please.

(Discussion off the record.)

Mr. Anderson: Mr. Belinskey.

[T. II, 91] Whereupon,

FRANK J. BELINSKEY,

a witness called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Mr. Anderson: Your Honor, we have a very little minor problem here.

We have a group of correspondence relating to the efforts by Hankinson to find out whether RSR Cooperative would be able in one way or another to arrange the delivery of power to Hankinson. We have correspondence on the one hand from Mr. Bartel of Central Power, and on the other hand correspondence involving Mr. Belinskey of RSR. We have marked it all. Unfortunately, Mr. Bartel for some reason or other left. He now works for NSP. I saw Mr. Spethmann and Mr. Bartel

this morning and Mr. Bartel apparently erroneously was operating under the idea that he didn't have to testify. There wasn't any objection to the foundation of the documents, but I am told that he was operating under a misapprehension of fact. Mr. Bartel had gotten confused somehow.

Perhaps the best thing to do would be to mark the whole batch. I have them all numbered in order. I have given the list to Mr. Field and we can decide whether it is necessary to try to bring Mr. Bartel [T. II, 92] in or not.

That being my explanation here, let me proceed to have marked in order a group of documents which will bear the numbers GX-330 through GX-343.

I believe I have given Mr. Lundeen a list of the new exhibit numbers cross-referenced to the prior numbers, so he has them all.

The Court: Absent objection, they may be received.

Mr. Field: We have some comments on them, Your Honor.

These are Bartel Exhibits, are they?

Mr. Anderson: That is right.

We don't have any questions of Mr. Belinskey.

The Court: Who are you, Mr. Belinskey. Who are you with?

The Witness: I am with the Special Technical Assistance Program of the Office of Economic Opportunity for the State of North Dakota.

## DIRECT EXAMINATION

By Mr. Anderson:

Q. Would you tell me what you did before you took that job?

A. I was general manager of the RSR Electric [T. II, 93] Cooperative from 1952 to 1968.

Mr. Field: If Your Honor please, first addressing myself to the exhibits bearing numbers 330, 331, 332, 333 and 334, eliminating for the moment 331 which are minutes of the board of directors of Central Power Electric Cooperative, the other exhibits I named are also written by Ralph Bartel, the witness that Mr. Anderson mentioned who has left us, temporarily, anyway. We don't have any quarrel with the foundation for these exhibits and we will concede the fact that Mr. Bartel wrote them and they are written, three of them are written to the gentleman who is sitting there on the witness stand, Mr. Belinskey, so we can inquire of him with reference to those letters.

We have one problem with Exhibit 330 that I do want to inquire from Mr. Bartel about unless we can dispose of it in some other fashion.

Maybe I should discuss it with you off the record before I say anything about it.

(Discussion off the record.)

Mr. Field: As to Exhibit 330, which is a letter from Ralph Bartel to the board of directors of Central Power Electric Cooperative, there is a handwritten note at the bottom which reads:

"Al, here is a copy of Ralph's letter to directors, Re: Washington meeting. Ted."

[T. II, 94] We are agreed that the Al there referred to is not Albert Hartl but some other Al, and to eliminate the possibility of someone inferring that it referred to Mr. Hartl, we have agreed that that is the situation.

Mr. Anderson: I am willing to agree—I am willing to offer the document without the handwriting on it. We are not interested in that.

Mr. Field: I don't believe we need Mr. Bartel to return, then, if these are all the letters he has written.

Mr. Anderson: Those are all we have.

Mr. Field: So we have no objection to these four exhibits, 330, 332, 333 and 334.

## CROSS-EXAMINATION

By Mr. Field:

Q. Do you know if Ted is Ted Rennick?

A. I don't know.

Q. You don't know?

A. No, I don't.

Mr. Field: Was Mr. Bartel to be the sponsor of these minutes? Was that his purpose?

Mr. Anderson: The first four documents, 330 through 334, were the ones we were going to have Mr. Bartel sponsor. Those minutes are referring [T. II, 95] to, 331, apparently Mr. Belinskey was at that meeting, so if there are any questions about those minutes, Mr. Belinskey could probably answer them.

[T. II, 96] Mr. Field: My only problem with 331 is not its authenticity but there are some statements made as to what the terms of certain contracts require and so forth which perhaps are in the realm of controversy and so forth.

Mr. Anderson: Those contracts I believe are all in the record anyway and, of course, if there is going to be any discussion as to what the contracts say we will be talking about the contracts themselves, not what the minutes say about the contracts.

Mr. Field: With that understanding we have no objection to 331.

May I inquire, Counsel, if 338 and 339 are duplicate letters, duplicate copies of the same letter?

Mr. Anderson: I will just quickly look at those. Yes, they are. I will withdraw 339. I am sorry, Your Honor.

Mr. Anderson: Let the record show I have just withdrawn GX-339 because through inadvertence we find that it is a duplication.

Mr. Field: May I see the original 338 then?

Mr. Anderson: Yes, 338 and 339 through inadvertence turn out to be identical so therefore I [T. II, 97] will withdraw 339.

Mr. Field: Exhibits 335, 336, 337, 338 and 340 are letters that are either written by Mr. Belinsky and that we may have some questions about the content, but we have no objection to the authenticity or the receipt in evidence of those letters.

(GX Exhibit 339 was withdrawn.)

Mr. Field: We have no objection to Exhibits 341, 342, 343, and I think that completes the particular list if I didn't miss some.

Mr. Anderson: That's it.

The Court: They may all be received.

(GX Exhibits 330 through 338, 340 through 343 received in evidence.)

Mr. Field: If I can ask a few questions now?

The Court: Yes.

## CROSS-EXAMINATION

By Mr. Field:

Q. Mr. Belinskey, you were manager of the RSR Electric Cooperative, if that's the right title of your organization?

A. That's right. Yes.

Q. And between what years was that, Mr. Belinskey?

[T. II, 98] A. 1952 through 1958.

Q. 1968?

A. 1968.

Q. And is RSR Electric Cooperative a member of Central Power Electric Cooperative?

A. Yes, it is.

Q. One of the exhibits that's just been identified and received is Exhibit 334. I should let you look at it so you are familiar with it.

A. Yes. I recall.

Q. This letter, for the record, is a letter from Central Power Electric Cooperative to Mr. Belinskey as manager of RSR Electric Cooperative dated January 24, 1964, and that letter submits, and the documents that are attached to it, two plans for the construction of electrical lines to bring either Bureau of Reclamation power or some cooperative power to Hankinson, is that a fair statement?

A. Yes. The plans were studied.

Q. Yes. Plans other than the use of Otter Tail Power Company lines?

A. Yes.

Q. Is this true, that the plans involve either an expenditure on the part of RSR or Hankinson for the lines that might be used under these plans?

A. It would be RSR.

[T. II, 99] Q. RSR?

A. Yes.

Q. I suppose it can be borne by either party?

A. Eventually it would be, whoever wheeled the power, would collect, yes.

Q. The City of Hankinson had, as the testimony shows, an allotment of power from the Bureau, so the source of power was available to them, wasn't it ?

A. To who?

Q. Hankinson?

A. To the City of Hankinson?

Q. Yes.

A. As far as I know, yes, it was.

Q. These are studies involving the construction of some lines to get the power to Hankinson without using Otter Tail lines? In substance that's correct, isn't it?

A. That's right.

Mr. Field: Excuse me just a moment. That's all the questions we have, Your Honor.

Mr. Anderson: We have no questions.

The Court: You may step down.

(Witness excused.)

The Court: We'll recess for about ten minutes.

(Recess taken.)

[T. II, 100] The Court: You are making good progress, counsel.

Mr. McNeil: The Government calls Mr. Joseph Perino.

Whereupon,

JOSEPH O. PERINO,

a witness called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. McNeil:

Q. What is your address, please?

A. Alexandria, Minnesota; 1205 Douglas.

Q. What is your place of employment?

A. Runestone Electric Association.

Q. And your position?

A. General manager.

Q. How long have you held that position?

A. Since 1952.

Q. Mr. Perino, what is the relationship between Runestone Electric Cooperative and Cooperative Power Association?

A. The Cooperative Power Association is our power supplier. We are a member of the Cooperative Power Association.

[T. II, 101] Mr. McNeil: I have just had several letters marked as Government's Exhibits.

At this time, I would like to propose these for introduction, Government's Exhibits 344, 345, 346, 347 and 348. All of these are letters either written by or written to Mr. Perino.

(Government's Exhibits 344 through 348 offered in evidence.)

Mr. Field: If Your Honor please, we have no objection to the receipt in evidence of Exhibits 344 through 348, being the exhibits just identified.

The Court: They may be received.

(Government's Exhibits 344 through 348 received in evidence.)

By Mr. McNeil:

Q. Mr. Perino, I hand you Government's Exhibit labeled 281 and ask you if you recognize that?

A. I recognize it, yes.

Q. All right. Did you respond to that?

A. Yes, I did.

Q. Is one of your letters your response to that?

A. This one right here (indicating).

Mr. McNeil: Let the record show that the witness identified GX-344 as being his response to GX-281.

[T. II, 102] By Mr. McNeil:

Q. Now, Mr. Perino, I show you Government's Exhibit 348 and ask you if you recognize that?

A. Yes.

Q. This is a letter addressed to Mr. Hartl from Mr. Perino?

A. Yes.

Q. Is this letter an accurate copy reproduction of the letter which you did send?

A. Yes, it appears to be a copy of it.

Q. Was there a response to this letter?

A. There was no response by letter, but I recall a telephone conversation that I had with Mr. Hartl.

Q. Who called whom?

A. Mr. Hartl called me and indicated that he had received my letter, but that he would not be answering it; not to expect anything from Otter Tail.

Mr. McNeil: That is all we have.

Mr. Field: We have no questions.

The Court: You may step down.

(Witness excused.)

Mr. Anderson: Your Honor, we have made such extraordinary progress here—

The Court: Very commendable.

Mr. Anderson: We have reached [T. II, 103] tomorrow's witnesses already. That raises a question. One of the witnesses we propose to bring in tomorrow is a fellow by the name of John D. Hickerson, who is with the Allison Williams Company in Minneapolis.

The purpose in bringing Mr. Hickerson in is to put in through him one letter which he wrote. If called, he will come over. He has been subpoenaed. The question is whether we

need to go through the exercise of calling him. The document bears the identification GX-228. Perhaps I ought to have it marked now as GX-349 so that the record is clear what we are talking about.

[T. II, 104] The Court: You just want him here to say that is his signature, he sent it. Cy, do you agree he sent it?

Mr. Field: I have no objection to its receipt in evidence.

The Court: It may be received.

(GX-349 received in evidence.)

The Court: Do you need those other two men from the bonding houses too?

Mr. Anderson: Well, it's not our intention to do much in the way of, if anything, in the way of direct examination. There again we have in each case a series of documents which they had a hand in either writing or receiving, in most cases writing, and the purpose of bringing those two gentlemen in is to authenticate those documents. The whole point of the exercise is to try to help us establish the fact that litigation does have a profound effect on the marketing of the bonds and upon the development of the municipal power system.

The Court: Does Cy Field know what the letters are?

Mr. Anderson: Yes.

The Court: Maybe he will agree they are authentic.

Mr. Field: Do you want to mark [T. II, 105] them or haven't you reached that point yet?

Mr. Anderson: I'm all set to do that.

Taking first things first, I will turn my attention to the documents that we were intending to put in through Mr. George I. Danforth, D-a-n-f-o-r-t-h, an attorney in Sioux Falls, South Dakota.

I might mention that while we have a break in the action

here I just talked to our economist. He tells me that through the scheduling problems he may not be able to come at all.

The Court: Do you have some other one or can you get along without him?

Mr. Anderson: Well, we are going to do a little thinking about it tonight and see. We may not really need him.

The Court: What was his name?

Mr. Anderson: His name was Dr. James Nelson.

We are very near the end of our witness sponsored documents and in order to further expedite things I prepared a list of our remaining group of a few other miscellaneous documents which have been offered without witnesses and I had prepared a little list of those and I have given it to Mr. Field.

[T. II, 106] Mr. Field: Have we gotten that?

Mr. Anderson: I gave two copies of it today.

Mr. Field: You call four pages a little list?

Mr. Anderson: In a relative sense.

And it will be a shame if Mr. Nelson can't testify. It took a long time to find an economist Scandinavian born in North Dakota and spent his summers in the lake country of Minnesota.

Tonight we are going to do a little thinking about calling Mr. Grahl who we had for Friday. Our mechanical problem is if we are able to get through everything else quickly this week our last witness can't be here until Monday. That's our problem.

The Court: Who is your last witness?

Mr. Anderson: That's the transmission expert Mr. Trommershausen and Mr. Zingmark who is going to be very short.

I would like the record to show that I have marked and offer in evidence a group of documents bearing the numbers

350 through 355. They all pertain to, in a general sense, Mr. George Danforth.

[T. II, 107] Mr. Field: Isn't it 356?

Mr. Anderson: I should amend that to say 350 through 356 inclusive.

(GX Exhibits 350 through 356 offered in evidence.)

[T. II, 108] Mr. Field: If the Court please, Exhibit 350 is a joint proposal for fiscal agency services, which is nothing more or less than a contract for fiscal services, as I understand it. It has nothing in it on the subject matter counsel mentioned, that I can see. We have enough immaterial matter in the record now, so one more won't hurt us any, but it doesn't seem to me it has any bearing on the matter.

Exhibit 351 relates to the same subject matter. The third paragraph states:

"If litigation should develop over the issuance and sale, and we were to assist in clearing that up, the matter of a fee for such service would of course not be included in the foregoing, but would be a matter for conference and determination."

That doesn't seem to reach the point that counsel mentioned either.

Exhibit 352 in our opinion is the only one that does relate to the matter counsel referred to. That states that a non-litigation certificate is necessary to market these bonds, and it seems to me that one would be sufficient for the purposes counsel has in mind.

Exhibit 353—I guess that exhibit is out of order, but maybe not. Yes, it is a prior letter referring to drafting a fiscal agency arrangement.

[T. II, 109] It would be prior to number 350. It's immaterial, in our opinion, just preliminary. Attached to it, however,

is a letter from Danforth, Danforth and Johnson to McCann and Martin, Attorneys at Brookings, South Dakota. The subject matter deals with the selling of bonds, and then paragraph 4 which recites:

"Presumably about the time some of this is done, you will likely hear something from Otter Tail, * * *."

We object to that as a self-serving statement and prejudicial.

Exhibit 354 is a letter from McCann and Martin to the Danforth firm, which is in answer to some letter from them. It also has a prejudicial statement in it, and we would object to it on the grounds that it's self-serving and prejudicial.

The third paragraph states:

"I would also advise that the attorney for Otter Tail has been nosing around * * *."

We think that is not pertinent to the subject matter that counsel is offering these for and is a prejudicial self-serving statement.

Exhibit 355, I would judge, is a certificate as of March, 1968, that no litigation is pending, in substance, and I assume it is harmless.

[T. II, 110] Exhibit 356 is a facsimile copy of one of the bonds.

Mr. Anderson: That doesn't purport to be the whole bond. That purports to be the legal opinion which the bond attorney rendered.

Mr. Field: I presume that is harmless.

There are certain of these exhibits that I have remarked on which contain these statements and do not relate to what they are offered for.

The Court: They may be received. I won't be prejudiced by those statements.

(Government's Exhibits 350 through 356 offered and received in evidence.)

Mr. Anderson: Our remaining witness tomorrow is Mr. John Holten, who is an attorney at law with a firm across the river called Faegre and Benson, and he, too, is a bond attorney and in connection with efforts to market bonds at Colman and Hankinson, Mr. Holten wrote letters and generally was retained to help them.

The Court: Would you show counsel the letters from Mr. Holten?

Mr. Anderson: Yes.

Mr. Field: Maybe I can shorten [T. II, 111] this up if I may have a moment, Your Honor.

I gather these exhibits are being offered for a similar purpose?

Mr. Anderson: That is right.

Mr. Field: I am willing to stipulate that in Mr. Holten's opinion, a non-litigation certificate is necessary in order to market revenue bonds.

Mr. Anderson: Are you also willing to stipulate that in order to sell the bonds, it's also necessary to have a source of firm power over the life of the bond?

Mr Field: Well, you don't state it in words that I would. I have forgotten what Mr. Holten said, but if he says that in his letters, I will be willing to stipulate that in his opinion, that is correct.

Does he state that? I am told that it isn't quite what he says, Mr. Anderson.

Mr. Anderson: That is my understanding, that in order to sell electric revenue bonds, the bond attorney has got to be satisfied that somehow or other there is going to be revenue from the operation of the electric plant. The only way there can

be revenue is if there is a supply of power available during the life of the bond and make sure that there will be money generated from the operation of the municipal utility so as to pay off the bond.

[T. II, 112] Mr. Field: I guess that is spinning our wheels.

The Court: Why don't you find his letter and read it?

[T. II, 113] The Court: In your statement you referred to it as an assured source of power in your opening statement.

Mr. Anderson: Right.

Mr. Field: I guess we have run into a problem. None of these towns have an assured source of power for the life of the bonds. They are contractual with the Bureau of Reclamation. You brought out on Muller's deposition that only runs to 1977, and if you are going to put in that kind of language why it just isn't so.

The Court: What the lawyers say, isn't that the point of it? What Holten says, does he say that?

Mr. Anderson: I submit it's implicit and the reason would be called—we went over and talked to him last week and this is in effect what he told us. The letters I say by implication make this point. They say you have to have a source of power in order to sell the bonds.

The Court: Why don't you introduce his letters. Do you object to his letters?

Mr. Field: There are some statements in them.

The Court: You want to examine him?

Mr. Field: There are some statements [T. II, 114] that are of a character that I would have to object to.

The Court: Well, you did your best. I guess we can't get any further with Holten. He is coming in the morning?

Mr. Anderson: He will be our only witness tomorrow, Your Honor.

The Court: We will start at 9:30 so you can tell him. Is that the only one left, and Monday you have the other man?

Mr. Anderson: The only other two things we have to do this week after Mr. Holten is finished is, A, we have to decide, we scheduled Mr. Grahl for Friday. Tonight we will give some thought to whether we really need to have Mr. Grahl testify, and then the remaining project is to decide what's going to happen to the documents on that list I just gave you which documents we are going to put in without witnesses and that's all this week.

Mr. Field: It will take a little time to process this four-page list we just have and which we will attempt to confer on after recessing today to facilitate our discussion of it tomorrow, but time-wise that would probably occupy some time.

The Court: So we will plan to have Holten at 9:30 in the morning. He may be a half an hour or an hour at the most, I suppose?

[T. II, 115] Mr. Anderson: By that time I hope to have some word on Mr. Grahl as to whether we will call him on Friday.

The Court: I forget now, he is with one of the electric co-ops?

Mr. Anderson: Yes. He is from Basin Electric Cooperative.

Mr. Field: Where does Graham fit into your plans?

Mr. Anderson: My present inclination is not to call Mr. Graham. Certainly we are not going to call him for our direct case, and I suspect we won't have to call him at all.

Mr. Field: Then next week, just trying to get a view towards when we would be called upon to go forward. It's Trommershausen and you are through?

Mr. Anderson: We have Mr. Zingmark who will take a very small amount of time on Monday morning and then Mr. Trommershausen and then that's the end for us.

Mr. Field: Thank you.

The Court: Trommershausen is the man from Denver?

Mr. Anderson: Yes.

The Court: The gist of his testimony is about the claimed dominance?

[T. II, 116] Mr. Anderson: Yes. Our hope is that he will put together a lot of these transmission contracts that are in evidence and make, without having to spend an enormous amount of time on it from our standpoint, make these things fit together.

He has prepared some maps and other things which will help us see how all of this fits together.

The Court: Have you taken his deposition?

Mr. Anderson: No. No.

The Court: You will probably spend some time on both sides with him?

Mr. Field: Yes, sir.

The Court: He doesn't know what he is going to say, really, does he?

Mr. Anderson: We have given him—Mr. Trommershausen has prepared some maps and those, of course, we have given to Mr. Field.

The Court: Have you given him those maps?

Mr. Anderscon: Right. But beyond that Mr. Field does not know exactly what we are going to do with him.

The Court: The gist of it, he is going to say Otter Tail is dominant in the area, dominant [T. II, 117] in the towns it serves, that the gist of it?

Mr. Anderson: I say basically, yes.

He is going to show how transmission agreements worked together to reinforce Otter Tail's basic dominance in transmission.

The Court: Has he got some educational background, long experience?

Mr. Anderson: Yes. He is the man who spent, I don't know, 40 years of his life specializing in the engineering of electric power systems in this area, and it so happens that he works for R. W. Beck which is a firm which has historically spent most of its time working for co-ops, and to some extent for municipalities, but he is the one man we found who really had an enormous background in this area, has been out here working in this area since before, I think before the Bureau of Reclamation did. Well, since the mid '50s at least. So he has a good deal of background, and he has great familiarity with the types of arrangements we are concerned with here.

The Court: He would probably take at least until noon on Monday?

Mr. Anderson: Yes. I would say.

The Court: I was wondering so Mr. Field would know when he is to be ready.

You have Al Hartl and some vice-president?

[T. II, 118] Mr. Field: Mr. Hartl, Mr. Nye and Dr. Morton are three basic witnesses.

The Court: Basic? Are there some others too?

Mr. Field: We have listed some others. In view of the narrowing down of the scope of the direct testimony up to date, we are seriously considering not calling the others. We haven't decided that yet. We had listed some other witnesses.

The Court: I guess I didn't see the second listing. The only three I saw were Al Hartl and the vice-president and that professor, economist.

Mr. Field: Yes.

The Court: Roughly how long would you—Mr. Hartl will tell about why the company did what it did and the reason for it, I suppose?

Mr. Field: And also the general background of Otter Tail Power Company, its development of its integrated system and what it's composed of and what effect the proposed requests that are made upon Otter Tail to service a town that is going to leave its system with either wholesale or retail service will have and the business reasons for the policies of the company in not assisting in that process of erosion of its system and impairment of its credit. He will tell the Otter Tail story, we hope.

[T. II, 119] The Court: Then Mr. Nye will have more details or on the administrative side of it or what will he tell us? Is that Mr. Nye there?

Mr. Field: That's Mr. Nye.

The Court: What will he tell us about?

Mr. Field: Well, he generally will answer, I hope, some of Mr. Trommershausen's material. He is in charge of the electrical distribution transmission system of Otter Tail.

He also has some maps.

The Court: Have you given him the maps?

Mr. Field: Yes. We have each exchanged exhibits both ways. Some maps with reference to—

The Court: Dominance?

Mr. Field: A theory of what we say is lack of dominance of transmission in the area.

He also has an exhibit on relevant market which is a pertinent part of an antitrust case.

Let's see, have I done justice to Mr. Nye's scope of testimony? But those are the major points of the major points anyway.

The Court: Then the other man, the economist, you had him lined up? You had some trouble [T. II, 120] about dates and all. He has been firmed up?

Mr. Field: I talked with him during the noon recess. He is going to call us over the week-end and see when he can be available. I hope it will be next week.

The Court: What would be the gist of his story? What will he tell us?

Mr. Field: He will analyze Otter Tail's situation from an economic standpoint and its integrated system and service to its customers and he will analyze the economic effect upon that system and upon the credit of the company if Otter Tail is compelled to assist by either wholesale or wheeling a town that wants to leave its retail system.

He will talk economically about the competitor factors that are involved in the generation, transmission and sale of electric power and generally support the economic conclusion that Otter Tail's system will be eroded and damaged and its credit impaired if it is ordered to furnish these services which Otter Tail's policy has been declining because of business reasons.

The Court: He is basically an economist?

Mr. Field: Yes.

The Court: A specialist in [T. II, 121] electric power?

Mr. Field: Yes. He is quite well qualified and has testified in a good many courts and commissions and written articles and has, I would say, an extremely well-founded background and a recognized economist in the field.

The Court: You haven't taken his deposition, I suppose?

Mr. Anderson: No.

The Court: Nor of your man either?

Mr. Anderson: No. Dr. Nelson's deposition has not been taken either. In that regard, I should say that Mr. Field and I

share a common problem here in dealing with economists, particularly of the type we are both dealing with. They are very, very busy people and they have an enormous difficulty fitting us into their schedules and that's the problem I adverted to earlier with Dr. Nelson. We originally scheduled him for the only day he then had open in the month of June which was June 18th, and for that reason we concluded he would have to be some sort of rebuttal witness because by June 18 it was our hope the trial would be over with, apart from that, and now he told us a few minutes ago, called a few minutes ago and said that his summer program he is in charge of at the University of [T. II, 122] Michigan has rearranged his teaching schedule in such a way that he has got some sort of obligation on the 18th and he can't show up on the 18th and now he wants to know if he can come on the 8th.

Well, I don't know, the 8th is just a difficult day for us and we are going to have to—that's one of the things we have to think about today and tomorrow since we will have a little free time to think about just how we are going to use him; whether we could possibly try to get him in on the 8th. If he comes in on the 8th he certainly will not be able to do very much. That's his only day and he has to go back.

And even more importantly we are going to have to think whether in general terms whether we can go without him altogether. He is a very, very eminent economist and I would think make a very impressive witness, but if we have to forego the chance to use him I guess we may have to, but we are going to give some thought to that tonight and tomorrow.

Mr. Field: I don't want to run into the problem of rebuttal witnesses being used as part of your direct case, however, and a warning that if he is called for rebuttal I will expect

him, or at least I will object to his being used for anything other than that.

Mr. Anderson: Our point in [T. II, 123] retaining Mr. Nelson was to train his intellectual guns at Dr. Morton. We had Dr. Morton's proposed exhibits and we sent all those to Dr. Nelson and our point is to have him offer some observations about those exhibits. That is why next Monday makes for difficulty for us because Dr. Morton won't have testified by that time and it's hard to use Nelson at that point.

I don't know what your practice is here, if the whole trial is over with and one of the witnesses simply couldn't be available, I don't know whether your practice is to permit a hiatus and—

The Court: I don't think we have any practice. I suppose we size those up case by case.

Mr. Field: I don't know what we are accomplishing for the moment, but if Dr. Nelson is going to be a witness we would like Dr. Morton to hear his testimony and address himself to that too. Whether he be rebuttal or otherwise we will try to do that.

The Court: Well, we have done very well and are making good progress here. I will see you in the morning at 9:30, gentlemen.

(Whereupon a recess was taken until 9:30 o'clock A.M., June 3, 1971.)

[T. III, 1]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

(Title Omitted in Printing)

The above-entitled matter came on for trial before the Honorable Edward J. Devitt, Chief Judge of the above-entitled Court, at Saint Paul, Minnesota, commencing at 10:00 o'clock A.M., June 1, 1971.

The following transcript contains the proceedings of June 3, 1971.

(Appearances as heretofore noted.)

* * * * *

[T. III, 2] The Court: Good morning, gentlemen. We have Mr. Holten, do we?

Mr. Jaeger: Yes, Your Honor, Plaintiff calls Mr. John Holten.

Whereupon,

JOHN S. HOLTEN,

a witness called by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Jaeger:

Q. Mr. Holten, what is your occupation and business address?

A. I am an attorney. I am with the firm of Faegre and Benson, 1300 Northwestern Bank Building, Minneapolis, Minnesota.

Q. In your work as an attorney have you been involved in the legal proceedings concerning municipal bonds?

A. Yes.

Q. And please briefly tell the Court about your experience and background concerning municipal bonds?

A. When municipal bonds are sold, they are sold subject to the approving opinion of a firm of attorneys. Our firm is one of the firms whose opinions are accepted for that purpose. I examine the proceedings and when asked help [T. III, 3] prepare the proceedings. If the proceedings are, in our opinion, in conformity with law we issue a confirming legal opinion when the bonds are issued.

Q. For approximately how many years have you been involved in this line of work?

A. Fifteen years.

Q. Now, are you familiar with what are referred to as electric revenue bonds?

A. Yes.

Q. And would you please explain to the Court what an electric revenue bond is?

A. Perhaps I could start by saying what a revenue bond is. Bonds are generally classified as either general obligation bonds which are payable from property taxes on the property within a municipality or are revenue bonds which are payable from a limited source.

Now, in the case of electric revenue bonds, these bonds are payable from the revenues developed by the municipal system, and if the bonds are to be paid at all, they must be paid from those revenues.

Perhaps I should go on to say what may be obvious, that the taxing power is not pledged to revenue bonds, and that's the basic difference between revenue bonds and general obligation bonds.

Q. Now, I believe you said that in your function as a [T. III, 4] bond attorney, you review the proceedings and eventually issue what you termed a legal opinion. Could you briefly explain what the legal opinion is?

A. The form of the legal opinion recites that we have examined the proceedings taken by the particular municipality or county or school district, as the case may be, and that the bonds are in our opinion valid obligations in accordance with their terms.

Q. And why is a legal opinion needed?

A. The custom of the municipal bond market is that bonds will not be accepted by the purchaser without an approving legal opinion of recognized bond counsel.

Q. Now, what are the principal factors which you as a bond counsel consider in determining whether to issue a legal opinion in connection with proposed electric revenue bonds?

A. Well, number 1, we have to be certain that there is statutory authority for the issuance of such bonds. Municipalities, unlike business corporations, have limited powers only, and you must therefore find specific authority for the issuance of bonds of any kind.

Secondly, in the case of revenue bonds, you must be certain that there is a system from which revenues may be developed so that the bonds in turn will be paid off. Now, we do not certify in our opinion that we are certain that the [T. III, 5] revenues will be accomplished, but we would not issue an opinion if we knew that revenues would not be available. Now, for that purpose, we have to know there is a system in being or

that there are funds available to build a system and that contracts have been let so that the system can be built within the funds available. That's part of it.

The next part of it is that the projection of the revenues and expenses must be such that it will be enough to cover debt service.

Q. Now, are there any other factors you would look at in addition to those two before you would issue a legal opinion?

A. Well, as part of that, if the electric system was not simply a distribution system, you would have to look to see that there was a source of power—let me restate that.

If it is simply a distribution system, that system must have a source of power or it will not be able to sell power, obviously. It's possible for a municipality to build a generating system as well as a distribution system in which case, of course, you would not need to look for an outside source of power.

Q. Now, in connection with the system that's only going to—there is only going to be a municipal distribution system and no isolated generation, I take it what you are saying is you need to be assured there is not only a supply of [T. III, 6] power but also a means whereby the power would be delivered to the town, is that correct?

A. That's correct.

Q. Now, in connection with issuing a legal opinion, do you make any consideration of whether there is any litigation involved concerning a town or the bonds themselves?

A. Yes.

Q. Could you just briefly explain what factors involving litigation you look at?

A. If litigation is brought involving a proceedings, this may itself raise a reasonable doubt about whether the proceed-

ings have been validly taken, and if there is a reasonable doubt in our minds, we should not and do not issue an approving legal opinion. We must be reasonably certain that the proceedings are valid. It's got to be more than a 51 percent chance that they are valid.

Now, there is a second thing and that is that when bonds are sold by the municipality, the custom is that a signature and no-litigation certificate be signed and delivered by the municipal officers to the purchaser.

Now, that litigation certificate would say that there is no litigation pending affecting these bonds, these proceedings, the pledged revenues, the incumbency of officers.

[T. III, 7] Q. Is the issuance of a no-litigation certificate a universal and uniform requirement in connection with the sale of revenue bonds, including electric revenue bonds?

A. It is a customary requirement. There are cases where the bondholder has waived the no-litigation certificate, but the custom is that a no-litigation certificate will be issued.

Q. Now, in connection with your work concerning municipal bonds, did you do some work in connection with the proposed issuance of electric revenue bonds in the towns of Colman, South Dakota, and Hankinson, North Dakota?

A. Yes.

Mr. Jaeger: At this time, I would like to have marked as Government's Exhibits 357 and 358, two letters written by Mr. Holten. The first exhibit, Government's Exhibit 357, is a letter dated February 23, 1965, addressed to Mr. Ernest Woytassek. The second exhibit, Government's Exhibit 358, is a letter dated January 28, 1965, addressed to Mr. Richard Healey.

By Mr. Jaeger:

Q. I would like you to look at Government's Exhibits 357 and 358, and I will ask you whether you recognize these two documents and whether these were written by you in connection with the proposed issuance of electric revenue bonds by the town of Hankinson, North Dakota?

[T. III, 8] A. Yes, I recognize them.

Q. They were written in connection with the proposed issuance of electric revenue bonds for the town of Hankinson, North Dakota?

A. They were written in connection with that project, yes.

Mr. Jaeger: I would like to have marked as Government's Exhibits 359 through 371, inclusive, a series of letters either written by or written to Mr. Holten concerning the issuance of electric revenue bonds for the City of Colman, South Dakota.

By Mr. Jaeger:

Q. My only question concerning Government's Exhibits 359 through 371, inclusive, is whether you recognize those letters as either letters you wrote or letters you received in connection with the issuance of electric revenue bonds by the City of Colman, South Dakota?

A. I do.

Mr. Jaeger: I would like now to have marked as Government's Exhibit 372, a three-page document entitled "Signature Certificate."

By Mr. Jaeger:

Q. Mr. Holten, looking at Government's Exhibit 372, is that a copy of the signature certificate you issued in connection with the issuance of revenue bonds for the City of [T. III, 9] Colman, South Dakota?

A. That is a copy of the signature certificate and no-litigation certificate which the officers of Colman, South Dakota, signed when the bonds were ultimately issued.

Q. Was this prepared on a form that is generally used by your law firm in connection with the issuance of such bonds?

A. Yes.

Q. Now, referring you to page two of Government's Exhibit 372, paragraph 4, that paragraph begins: "There is no litigation now threatened or pending," and the paragraph continues.

Is that the paragraph that generally is considered to be the no-litigation certificate that you were referring to?

A. Yes.

Mr. Jaeger: I would like to have marked as Government's Exhibit 373, a one-page document with the heading of "Faegre and Benson" on the top, and entitled "$95,000 Electric Revenue Bonds of 1964, City of Colman."

By Mr. Jaeger:

Q. Mr. Holten, looking at Government's Exhibit 373, do you recognize that as a copy of the legal opinion which you issued in connection with the sale of the electric revenue bonds for the City of Colman, South Dakota?

A. Yes. Let me say that the original was signed.

[T. III, 10] Mr. Jaeger: At this time, Your Honor, I would offer Government's Exhibits 357 through 373, inclusive, into evidence.

(Government's Exhibits 357 through 373 offered in evidence.)

The Court: Absent objection, they may be received.

Mr. Field: I have some objections, Your Honor.

If the Court please, Mr. Holten, whose qualifications have been established as the bond attorney, testified orally without objection here this morning concerning the two items that counsel announced he was a witness for; one, that a certificate as to no litigation is required in order to market bonds, or

substantially that; and, two, that a source of power is a consideration by the bonding attorney in approving revenue bonds. That's been covered fully and without objection by oral testimony.

Now, we have 17 documents offered as exhibits, many of which are, most of which are correspondence between Mr. Holten and third parties. They contain many more things than the objectives that I have mentioned that this witness was called for, and observations about various things that we consider self-serving and conclusions.

The witness is here to testify on any [T. III, 11] material fact we have in the case. It doesn't seem to me to be proper, having covered the field, to then say, "Have you written some letters or received some letters?", and then offer that as some sort of a process of additional evidence. One can't create evidence by writing a letter or receiving a letter.

The witness is here under oath and has told us about these matters. There are one or two documents in this list that perhaps don't fall into that category, and I would be glad to mention those as being not within the realm of my objection.

Exhibits 372 and 373, respectively, the no-litigation certificate, I guess I can describe it that way for general purposes, and the Colman matter, 373, being the opinion of Faegre and Benson, and Mr. Holten is a member of that firm, and the legality of the bond of some significance, that isn't characterized by my general objection.

We wouldn't have any objection to those two exhibits, if they will be helpful in any way.

All of the other offered exhibits we object to individually and collectively. They are correspondence between this witness and third parties. There are many observations that Your Honor would see, if you examined those documents, but

they are situations that are involved in controversial areas and the observations of either this [T. III, 12] witness or the person writing to this witness in regard thereto should, in our opinion, not constitute any evidence in this case.

They are not only hearsay, but self-serving and prejudicial.

Mr. Jaeger: I might briefly comment that my questioning of Mr. Holten went along the lines of the general requirements that are necessary for the issuance of electric revenue bonds, and we don't propose to ask Mr. Holten any questions about these documents.

We feel they speak for themselves, and they merely place in evidence the specific problems or specific situations that were involved in the towns of Hankinson and Colman, South Dakota, which are two of the towns involved in this lawsuit.

I think it is very important to have these documents in the record to show the specific problems involved in those two towns.

As far as the problems of hearsay or other statements made in the letters, Mr. Holten is here. He is on the stand and he is available for questioning if Mr. Field has any questions about the statements in the letters. Mr. Holten is here and he can be asked about those statements.

Mr. Field: If Your Honor please, I [T. III, 13] didn't understand the rules of evidence to be such that hearsay, self-serving letters can be introduced and then the burden is on the other side to go into them and to question about them. We renew our objections to those exhibits.

The Court: I don't really see how that will help. I don't think it will harm anything.

Mr. Field: I will have to cross-examine on them if they go in.

The Court: Your suggestion is that 372 and 373 are not objectionable?

Mr. Field: That is right, Your Honor.

The Court: I have read them all anyway. I don't see how they help us, really.

Mr. Jaeger: I think they give the specific problems that were involved with the towns of Hankinson and Colman, South Dakota; with Hankinson with respect to getting power delivered to the town; with Colman, the litigation. I think those are issues in this case, and I think these documents help explain the problems that were involved there.

The Court: You have really stipulated to the ultimate facts, haven't you; the vital thing you wanted from Mr. Holten that you couldn't agree on yesterday, his opinion, he expressed what he considered when giving his approval to these bonds.

[T. III, 14] Mr. Jaeger: That is correct, Your Honor, except we want to show, at least as to each of these two towns, the particular problems involved in those towns. We haven't reached any stipulations in that regard. When we originally proposed our stipulations, we had some comments in there—

The Court: Specifically, what helps us in those exhibits?

Mr. Jaeger: With respect to Colman, Your Honor, I think it gives the chronology of the delay and the problems caused by the litigation that was involved in the City of Colman, and it shows from the bond counsel's standpoint what difficulties were caused him by the various types of litigation that got involved in Colman. It shows the time span, how long a delay there was, and it flushes out our argument about the effect of litigation upon these towns in trying to set up their municipal electric systems.

The Court: I will receive them all. I think the only disadvantage is that we have to have a lot of cross-examination about a lot of things that don't help us.

They may be received.

(Government's Exhibits 357 through 373 received in evidence.)

[T. III, 15]

## CROSS-EXAMINATION

By Mr. Field:

Q. Do you have the exhibits in front of you, Mr. Holten, so if I refer to them you will have access to the same material?

A. Yes, Mr. Field, I do.

Q. Let's refer first, then, to Exhibits 357 and 358. Those two exhibits relate to Hankinson, North Dakota?

A. That is correct.

Q. And there is no litigation problem there reflected in these letters, is that correct?

A. There was no litigation at that time, to my knowledge.

Q. These are the only two exhibits that have been offered in this series of exhibits relating to Hankinson, isn't that true?

A. I believe that's correct. They speak for themselves.

Q. Exhibits 359 through 373 all relate to Colman?

A. I believe so.

Q. Some of those letters refer to litigation, do they not?

A. Yes.

Q. Just going through them so that we can see what they are, Exhibit 359 is just a request for your services, isn't it, substantially?

[T. III, 16] A. I believe so.

Q. And Exhibit 360 is your response, that you would be glad to help them and explain something about the law involved in doing so?

A. That is correct.

Q. Exhibit 361 merely refers to sending out the prospectus for the sale of the bonds, is that true?

A. That is correct.

[T. III, 17] Q. Exhibits 362 inquires as to whether litigation has been determined and whether you should keep your file open or bill them or substantially that?

A. That's correct.

Q. Exhibit 363 is Mr. Miller's reply to 362. Now, for the record, Carl W. Miller was the City Attorney for Colman, was he not?

A. That's correct.

Q. And the substance of 363 as Mr. Miller advised you, they were still planning to go ahead with the project?

A. Yes. And that the litigation was still in process.

Q. Now, speaking generally of Colman litigation, are you familiar with the fact that there were two pieces of litigation in Colman?

A. Yes.

Q. And are you familiar with the fact that both cases were tried not only in the District Court but in the Supreme Court of South Dakota?

A. Yes.

Q. And one of the cases reported, you may not have the reference there, perhaps you can find it, subject to check perhaps you could accept the fact it's reported in 121 N.W. 2d 483?

A. If you will let me look at my file I can verify that.

[T. III, 18] Q. If you want to I will be glad to have you.

The Court: I am sure you will take the representation of Mr. Field that it's there?

The Witness: Sure.

By Mr. Field:

Q. All right. Generally speaking, are you familiar with the fact that at least in some respects that case involved the question of the legality of the proceedings in establishing the municipal system in Colman?

A. Yes. That's what it involved.

Q. And are you familiar with the fact generally that the decision of the Supreme Court is based in major degree upon the passage of a curative act?

A. That is correct.

Q. Which operated, the curative act did, to eliminate the legal questions which were involved in the proceedings to establish a municipal system?

A. Yes. The Court said it did not have to pass on those questions in view of the validating act.

Q. Yes. And that act, validating act, was passed while the case was pending, that's true, isn't it?

A. I don't believe that is correct.

Q. Maybe we better check that then.

A. If you can tell me when the case was commenced, I can tell you when the validating act was passed in relation to [T. III, 19] that.

Q. Well, I guess we could check those things, but at least we are agreed that the Court disposed of it on the basis of the validating act?

A. Yes.

Q. Perhaps some of my associates could help me on that detail if you will excuse me for a minute.

Mr. Jaeger: Maybe if it would speed things along, Government Exhibit 150 is the complaint that was filed in that case, Otter Tail, et al versus Colman et al, and we have the date here as May 26, 1961.

Q. Does that help you, Mr. Holten?

A. I believe that the 1961 session of the legislature of South Dakota had adjourned by that date and that the validating act had been passed at that session.

Q. Went into effect on July 1, if it did?

A. It went into effect in accordance with their constitution on July 1.

Q. And I guess subject to my assistants' doing some checking here, we are agreed the validating act was passed the same year that the lawsuit was started and went into effect after it was started?

A. That is correct.

Q. And I presume we can agree on this, that the validating act was passed subsequent to the time that the [T. III, 20] proceedings were taken which were validated?

A. Yes.

Q. And perhaps we can agree on this one further point that there was some controversy, legal controversy in the case as to the application of the validating act, or aren't you familiar with that?

A. I don't recall that.

Q. You, of course, didn't participate in the litigation?

A. I examined the complaint and made suggestions to Mr. Miller, but I was not counsel. I did not write the briefs.

Q. I see. You were consulted in connection with the course of the litigation, were you?

A. Yes.

Q. And furnished some assistance not only as bond attorney but as, at least a consulting, if not appearing on the papers, attorney in connection with the litigation?

A. As I have said, I examined the complaint and I made some suggestions, principally legal references, that I thought might be of assistance.

Q. I guess we can agree on this, that the case was tried out on its merits at the level of the District Court and at the level of the Supreme Court of South Dakota?

A. I am sure it was.

Q. Yes. Then if we can come next to the other piece [T. III, 21] of litigation in the Colman situation, would you accept subject to check or in any fashion you wish, the fact that the Supreme Court decision in that case is reported in 130 N.W. 2d 109?

A. I simply have to take your word for that.

Q. Did you assist as a consultant or in some fashion in that piece of litigation too, Mr. Holten?

A. Again I examined the complaint and made a response.

Q. You mean by response to the city attorney?

A. To the city attorney. I think I—I think it was not the complaint. I think that involved an initiative petition and the city attorney consulted me with what I thought their position would be on the initiative position and what effect it would have on the sale of the bonds.

Q. Did you assist in the legal preparation of the defense of the case?

A. No.

Q. As you have told us already, you are familiar from your contacts you did have with the fact that it was a writ of mandamus proceeding seeking to compel the council to respond to an initiative petition? Do I describe it somewheres near accurately?

A. Whether it was mandamus or not, I am not sure, but it did involve the initiative process.

Q. And are you familiar with the fact that the [T. III, 22] decision of the Supreme Court in that case was based largely upon the effective date of a certain law which provided a procedure for initiative petition in situations of this kind?

A. As I recall it, the Court chose to go on that ground, yes.

Q. Well, then, the Court did go on that ground?

A. That's what I have said.

Q. That particular law which provided for this type of proceeding, as the Court determined, the effective date, effective date of the act was subsequent to the proceeding in this case, but did not go into effect and became a law thereafter, that's true, isn't it?

A. Well, if I understand your question correctly, that's true; but let me say that the proceedings which was an election authorizing the issuance of these bonds had been held before this second law was passed and went into effect.

Q. Well, I guess we get back to our original question. The determination of the case depended on the effective date of that law that authorized this type of procedure and whether it applied to the proceedings involved in Colman?

A. The Court based its decision on that ground.

Q. Yes. And I presume we can agree that this second case was tried out on its merits at both the level of the District Court and the Supreme Court of South Dakota?

A. I did not take part in that trial process or in the [T. III, 23] Supreme Court. I felt that the case could have been disposed of easier.

Q. Well, you not being the court, perhaps we shouldn't go into that, but have you some doubt that the case was tried out on its merits at those two levels?

A. If I knew what you meant by being tried out on its merits I would answer more directly. I think there were several grounds on which that case could have been decided.

Q. You would have picked another one that the Supreme Court didn't, is that what you are telling us?

A. That is correct.

Q. Well, whatever the grounds may have been, as a lawyer, and I presume having seen the decision of the Supreme Court and perhaps the decision of the District Court, have we any problem with agreeing on the fact that the case was tried out on its merits on legal issues that were presented?

A. There were legal issues presented and some of the legal issues were decided, enough to dispose of the case.

Q. Can we agree on this too, Mr. Holten, that both of these cases as decided by the Supreme Court turned upon the construction of and the application of certain statutes in the State of South Dakota?

The Witness: Would you read that question back, please?

(The question was read.)

The Witness: Yes.

[T. III, 24] By Mr. Field:

Q. My associates have suggested another area for me to ask questions about, Mr. Holten.

You testified on direct examination that in order to issue an approving opinion as bond attorney for the revenue electric bonds, you need to be assured of a source of power for the system?

A. That's correct.

Q. In that connection, are you concerned with the nature of the source of power or who it is from?

A. No.

Q. Who supplies it?

A. No.

Q. Any source of power that furnishes power to produce revenue would suffice as far as the bonding attorney is concerned, you being in that category?

A. Yes.

Q. Is it required in your position as bonding attorney that that source of power be firm for the entire life of the bonds in order to issue an opinion?

A. Well, it's a practical question, in that if we had any doubt that power would be available, I would not approve the bond; that is to say, there need not necessarily be a contract as long as by some right or other the source of power would become available at a price which would [T. III, 25] enable the municipality to, in turn, resell the power and develop the revenues necessary to pay the bonds.

Q. I guess I didn't quite make my question clear, it was the length of commitment or firmness of the supply of power for the term of the bonds. Do you require that to be established for that length of time before issuing an opinion, or not?

A. I meant to say that for as long as the bonds are outstanding, we have to be satisfied as a practical matter that there will be power.

Q. One of these instances involving this, of course, is Colman, South Dakota?

A. Yes.

Q. Which did put in its municipal system and concerning which you did issue your final opinion approving the bonds?

A. Yes.

Q. And the bonds were sold?

A. Yes.

Q. What was the source of power that satisfied you for your opinion in the Colman case?

A. I don't recall, but we did get evidence that the power would be available.

Q. Do you recall that it was the Bureau of Reclamation?

A. I don't recall, no.

Q. Did you look into that at that time?

[T. III, 26] A. We got evidence at that time that power would be available.

Q. Did you get evidence at that time that the power would be available for the full term of the bonds?

A. I believe so.

Q. What is the term of the bonds at Colman?

A. The opinion, which is Government's Exhibit 373, states that the bonds mature through December 1, 1979, and I believe that's correct.

Q. The question was, how long are the bonds?

A. They run until December 1, 1979.

Q. And their date of issuance?

A. They were dated September 1, 1964.

Q. There has been some testimony through a deposition of a Mr. Muller of the Bureau of Reclamation, which, of course, you are not familiar with unless somebody has told you about it?

A. I am not familiar with it.

Q. Taken in this case, indicating that in his judgment, at least, the supply of power from the Bureau of Reclamation is going to be limited from 1977 on, at least.

Did you make any investigation of that permanency of the Bureau of Reclamation's supply of power?

A. As I have said, I believe we have evidence that the supply of power was to be firm throughout the life of the [T. III, 27] bonds.

Q. And what form did that evidence take? We are interested in it, if that is the fact.

A. It may have been a letter, a certificate.

Q. Do you have your file here?

A. I do.

Q. Do you have anything you could refer to that would suport you—I am not questioning your statement—but that would be the evidence you are speaking of?

A. I would be glad to look. It may take me a little while. It's a thick file.

Mr. Field: Perhaps that may or may not be feasible, Your Honor. Perhaps we could do something else while Mr. Holten is doing that, if he is willing to engage himself that way.

The Witness: Certainly.

The Court: All right. You may step down, Mr. Holten.

Do we have some other constructive activity we can engage in here?

How did you get along yesterday? Weren't you going to try to stipulate as to a four- or five-page list of exhibits?

Mr. Anderson: We have that here. I don't know whether Mr. Field has had sufficient time to go [T. III, 28] over the list or not, but if he has, perhaps we can take care of that.

Mr. Field: We went through it before we went home last evening, and if there is to be a stipulation, we have some comments and objections to make. That will take a little time. We can start in now, if Your Honor would like.

The Court: That is fine with me.

Mr. Anderson: Let the record show that I have handed the reporter a five-page document entitled "Exhibits which Plaintiff Proposes to Offer as Evidence Numbered in Order of Introduction."

The first number is GX-374 and it runs through GX-426.

I also hand the reporter the pile of documents which bear the numbers 374 through 426, inclusive, and I offer this group of exhibits.

(Government's Exhibits 374 through 426 offered in evidence.)

Mr. Anderson: This is pretty much, Your Honor, as far as we now know, is virtually the end of the trial as far as documentary evidence is concerned in this case on our side.

I might point out, Your Honor, that a number of these documents concern things such as municipal [T. III, 29] agitation which happened some years back, in our deposition of Mr. Hartl, in particular, and to some extent with Mr. Nye we went into these matters a little bit, and I think those deposition transcripts show that there are two sides of the story to the thing. The picture is rounded out there.

Mr. Field: If I may have a moment, Your Honor, to get organized here.

If Your Honor please, there are several different classifications of these exhibits from the standpoint of our comments or objections.

The first one is, according to our analysis of the list, several of them are already identified in connection with the depositions.

According to our notes, proposed Exhibit 374 was Hartl Deposition Exhibit 21. 375 was Hartl Deposition Exhibit 22. Proposed Exhibit 377 is included in the stipulation, Supplement No. 1, paragraph 72, that being 72-Q.

378 is also included in that same stipulation, paragraph 72-T, which has now been renumbered, I believe, as 293 and some alphabetical letter.

Also, 378, according to our record, is identified as Hartl Deposition Exhibit 28.

Proposed Exhibit 380 has been [T. III, 30] previously identified as Nye Deposition Exhibit 2.

381 is Nye Deposition Exhibit 1.

382 is Hartl Deposition Exhibit 29.

The Court: I think Mr. Holten is ready, but I am not sure.

Mr. Field: I will interrupt at any time he is, Your Honor.

Whereupon,

JOHN S. HOLTEN

resumed the stand and testified further as follows:

CROSS-EXAMINATION
(Continued)

By Mr. Field:

Q. Now, Mr. Holten, you have looked at your file and you have found some letter, I believe, which you handed to me, were kind enough to show to me, that responded to the question that we took a short recess for?

A. Yes, a letter and also a report of the consulting engineers to the City of Colman, which had preceded that.

Q. Is the letter itself the item that responds specifically to the subject matter we were discussing?

A. The two documents together do, I believe, Mr. Field.

Mr. Field: May I digress for a moment and see if this report is an exhibit in the case?

Mr. Anderson: It is.

Mr. Field: I recalled it was, and if we can locate its number, it might be helpful.

[T. III, 31] Mr. Anderson: It's Exhibit 309, Mr. Field.

By Mr. Field:

Q. We have in this record now Exhibit 309, the document I am showing you. Let's see if that's a copy of the one you are referring to?

A. Yes. It seems to be.

Q. Then could you identify for us the page or pages in what I will refer to as Exhibit 309 that help respond to the matter we were discussing in addition to the letter which you have produced and which we will mark in a moment?

A. Yes. The consulting engineers in their report, which is Exhibit 309, pages 8 and 9, refer to power being available from USBR, which is the United States Bureau of Reclamation.

Q. Is it pages 8 and 9, that was my question, that the material is on?

A. Yes.

Q. I dislike to remove this from your file. We can make copies of it later and return it to you.

A. That will be fine.

(Defendant's Exhibit 22 marked for identification.)

By Mr. Field:

Q. Now, Mr. Holten, what's been marked Defendant's [T. III, 32] Exhibit 22 is a letter that you handed to me in response to this subject matter, is that true?

A. Exhibit 22, yes.

Q. That's a letter from the regional director of the Bureau of Reclamation to the mayor of Colman, if I can abbreviate it that way?

A. That's correct.

Q. And that concerns an allocation of power and so on?

A. Yes.

Mr. Field: We will offer Exhibit 22, and in connection with the offer I would like to make arrangements for copies to be made and the original returned to Mr. Holten.

(Defendant's Exhibit 22 offered in evidence.)

The Court: Absent objection it may be received and copies may be substituted.

Mr. Anderson: No objection.

The Court: It may be received.

(Defendant's Exhibit 22 received in evidence.)

By Mr. Field:

Q. Now, referring to Exhibit 22 and the second paragraph which I guess concerns itself with the subject matter we have been talking about, and I will quote: [T. III, 33] "Your allocation of 500 kilowatts will be held for you so that you may receive any part of it desired when you are ready to take Bureau power."

Is that the basis for your being assured of a source of power that you spoke of?

A. Yes. That's correct. The preceding paragraph refers to the letter, that is, the city expected to require firm power.

Q. We will read that, too, then if that is something in the context that should be considered. The first paragraph I will quote that after, "Dear Mayor Westling:

"Thank you for your November 27, 1962, letter advising us that you expect to require firm power service from the United States during the next twelve months."

And then follows a paragraph I read in the first instance.

Now, my question is, is that the basis for your assurance of a supply of firm power?

A. That's correct.

Q. I guess obviously my next question is where therein is there any assurance that it will be available during the life of the bonds?

A. I would—it is not therein.

Q. Where is it if it's anyplace?

A. I cannot answer that question.

[T. III, 34] Q. I see. Can you answer it to this extent, that you have nothing that indicates that the Bureau power will be available during the life of the bonds?

A. I think this subject may have been covered further in the engineer's report.

Q. Can you point to something that says that anyplace in your file?

A. At the moment I cannot.

Q. Do you need more time?

A. I could go through the report line by line, but that's the only other thing I can think of as supplying that information.

Q. Well, if you have such a reference we would like to have it. I don't like to burden you with the clerical job here but you have made the statement that that was required, and I am asking for some evidence in your file that it was furnished.

Would it be asking too much of you to make the search to see if there is anything that you are not conscious of now? You don't have anything at hand now that says so, do you?

A. I don't recall what if anything more there is in the files and this report of the engineers and this letter from the Bureau of Reclamation which relates to source of power.

[T. III, 35] Q. May I suggest by asking you if perhaps you assumed that because the Bureau was starting with a supply of power that it would continue indefinitely?

A. Perhaps I did.

Q. It looks that way from what we have in front of us now, doesn't it?

A. I wouldn't draw that conclusion.

Q. I see. Then if you think you can find something more for us and if the Court will permit us to indulge ourselves in that activity, and you are willing to do it, why I suggest that we give you the opportunity to do so.

What we are looking for is a statement in your file anywhere that the Bureau power which is a source of power will be available for the life of the bonds?

A. I will look if the Court wishes me to do that.

The Court: Are there any other questions of Mr. Holten? If not he may step down.

Mr. Field: I presume we will interrupt again when he has finished his look?

The Court: Is there something in the file here? I had the impression you went through his file.

Mr. Anderson: We have the things in the exhibits in the trial of this case, I think, which would clear this up.

[T. III, 36] The Court: I thought Mr. Holten, he wanted him to go back home.

The Witness: No, I will look right here, Your Honor.

The Court: All right. Fine.

Mr. Field: Sorry to bother you but thank you.

(Witness temporarily excused.)

Mr. Anderson: Mr. Field was talking before about the fact that some of the documents listed on this list are also identified, have been marked during the course of the depositions as deposition exhibits. What we did here was to group things by subject matter and we have taken them out of the sequence they were put in in the depositions.

What we have done in order to simplify everything is we prepared a cross index. On one side of the page it shows the deposition exhibit. The other side of the page it shows the GX

number that we are using here in the case and as soon as everything is marked that is going to be completed, we will type in all those things that are blank now and that cross index, I think, will solve all problems we have with respect to that.

Mr. Field: Well, I hadn't finished my list of documents that fell in that category [T. III, 37] responding to the general problem. I don't think having two documents with a cross index simplifies things at all. I think there ought to be one document.

Mr. Anderson: There will be one document.

Mr. Field: There is already in the file in these depositions those documents that were filed.

Mr. Anderson: We just offered, Mr. Field, we just offered the depositions, and we marked separately from the deposition the exhibits that were used in the deposition. We gave each exhibit a separate GX number which we have identified here on the list of documents we are giving you. We did not, in other words, throw everything in in one big lump. We marked the deposition transcript and then separately we marked each of the depositions giving each one a separate GX number. That's the way we customarily handle these things in trials, and we thought it would be more sense to do it that way.

It's easier to refer to it in a brief than it would be if you had everything embraced within one big large GX number, one GX number for the deposition with 50 exhibits attached to it. We thought it made more sense to do it this way. We do not have duplicate copies of the documents in this listing here. We have only one copy of each.

[T. III, 38] Mr. Field: Well, I am confused. We took some depositions, actually they were discovery oriented, but counsel chose to use them for evidence. I guess he has a right

to do that so we didn't object. He offered the entire deposition. We made objections to certain parts of it. I suppose that included the offer of the exhibits in the deposition. Am I wrong there?

Mr. Anderson: The list we gave you, Mr. Field, specifically showed that, for example, I forget what number the Muller deposition exhibit was—

Mr. Field: I am not talking about Muller.

Mr. Anderson: The same procedure. We gave a number to the deposition. We said so on this list. Thereafter we gave a separate GX number to each of the deposition exhibits. We so indicated on the list and we are going to bring it all together with this cross index that I just got through telling you and the Court about. I don't see any particular problem here. I don't see any difficulty at all.

We thought it would simplify everything and would make the whole process a good deal simpler if we did have a separate GX number for each deposition exhibit, and that's what we did and that's what is indicated on this list of exhibits which we have given you.

[T. III, 39] Mr. Field: Well, certainly all of the Hartl, Nye, Seashore, Brewer, Nygaard deposition exhibits aren't identified on this list.

Mr. Anderson: We didn't offer every one. If you would like us to offer every one or you would like to offer those we left out that's fine.

Mr. Field: You offered the whole deposition. Now, doesn't that mean you offered the exhibits? We made objections to certain parts of it. We made that record here.

Mr. Anderson: Well, if I have proceeded erroneously in that regard, Mr. Field, I will mark every—I don't think there are very many other exhibits that we have left out. We left

out one that had to do with rates. It was a rate schedule about an inch thick that we thought we didn't need but we will mark that. We will go through and mark every one we left out and that will take care of that.

Mr. Field: Well, it's a matter of the record we have in this case. You take depositions and then you offer the depositions and now you tell us you don't offer all the exhibits, and what kind of record have we got?

Mr. Anderson: Well, we will have this—with the cross index we are preparing it will be [T. III, 40] readily apparent. We will put the cross index with the deposition transcript. That cross index will tell you exactly where the deposition exhibits are in the record and I think that solves the problem.

Mr. Field: Well, Mr. Anderson, I don't like to quarrel about semantics or order of procedure, but I am picturing somebody reading those depositions some day and it says Hartl Exhibit 10 and you are talking about GX number 395 or something, and the deposition hasn't been gone through and remarked. How do we keep some order to this?

Mr. Anderson: The way we do it, the way we generally do it in cases of this type is the way I have done it here. We mark them as a GX number. We, at the end of the deposition, we have this cross index so that if someone is interested in finding where Hartl Deposition Exhibit Number 10 is, he just looks at the cross index. That tells him Hartl Deposition Exhibit Number 10 has been marked as GX-183, and he finds it. That's the way that we customarily handle it.

Mr. Field: Now, just because you handle something customarily—

Mr. Anderson: Seems to make sense to me.

Mr. Field: —doesn't make it easier for some of us that aren't in the custom. I am just [T. III, 41] trying to straighten

things out. I don't think it necessarily supports you just to say you customarily do it that way. I suppose it's up to the Court to tell us how we should do it.

Mr. Anderson: I don't suggest that's necessarily the only way to do it, but we tried it before and we find it works and other people find it works, and if there is a better way of doing it I will be the first to change if we can do it a better way, but we think this is clear.

Mr. Field: Let me say one thing more from the record standpoint. You offered all the depositions, I am talking about the Hartl, Nye, et cetera depositions taken in Fergus Falls, and we made a record about our objections to certain portions of it which was done by furnishing a document to the Reporter to incorporate in the record rather than take the time to go through them.

Now, as Your Honor will recall, that record has been made and will be fairly clear and doubtless some portions of that involve some of these exhibits and probably do. Now, where are we going to be with that record if we change exhibit numbers and so forth?

Well, in any event, let me say this, no matter how Your Honor tells us we should do it—

The Court: I have withheld observations because I thought I would confuse it three ways [T. III, 42] instead of two. Can't you sit down this afternoon and agree on something? You are the men who are going to be working with them later on, I gather. I think you should find something that would please both of you.

Maybe Mr. Lundeen and one of these other men could be arbitrators and solve the problem.

Mr. Anderson: As I understand it, Mr. Lundeen and Mr. Jaeger already made a date to go over the exhibits this afternoon anyway.

The Court: Maybe they could solve the problem for us all.

Mr. Field: It sounds like a good idea.

Mr. Anderson: We didn't mean to suppress any evidence by not offering every deposition exhibit, Your Honor. I don't think there are very many that are excluded.

Mr. Field: How can you offer a deposition without offering exhibits? I can't understand that.

Mr. Anderson: We will offer all the rest of them.

The Court: I gather Mr. Field would prefer if there wasn't a duplication maybe in this list. I think that's his point, is it?

Mr. Anderson: There is no [T. III, 43] duplication.

The Court: Well, I mean with numbering, for instance, he said if the first one 374 that was already in exhibit with a deposition exhibit number on it.

Mr. Anderson: Well, if we had—when we introduced it, offered the deposition for introduction in evidence in this case, if we had had attached to that deposition all the exhibits that we took in with the deposition then it would be a duplication.

[T. III, 44] The way we did it, we offered only the transcript itself and we separated from the transcript the exhibits that were introduced during the deposition; we marked them separately with numbers here and introduced them separately here. There is only one of each document in this record. The only problem is, it's—many of them don't immediately follow the deposition transcript itself, and that's the reason why we prepared this cross-index.

The Court: Shall we leave that to Messrs. Lundeen and Jaeger?

Mr. Anderson: Yes, Your Honor.

The Court: Shall we be governed by their judgment, then?

Mr. Field: Mr. Lundeen told me there is something he wants to straighten out before we get into that.

Mr. Lundeen: All of the exhibits in the depositions that were mentioned are clearly a part of the record, and I believe Mr. Anderson has conceded that now.

Mr. Anderson: I will be more than happy to, yes. To the extent that I have through inadvertence and perhaps even sloppiness omitted some of the deposition exhibits, I will immediately repair that damage by offering all those that I have not offered, and hopefully, that will solve the problem.

[T. III, 45] Mr. Field: The deposition exhibits are in the files of this Court filed with the depositions, and they are here and are documents.

Mr. Anderson: Okay.

Mr. Field: Shouldn't we take the deposition exhibits and put your GX numbers on those, rather than these documents you marked now?

Mr. Anderson: It's a question of mechanics that can be worked out this afternoon.

The Court: Shall we abandon all further work until this is straightened out on this five-page document?

Mr. Anderson: Perhaps we can complete Mr. Holten and then we can adjourn to do this sort of mechanical thing.

Mr. Field: I might say this, Your Honor, all of the exhibits identified this morning on this four- or five-page list are not in that category. There are some new ones, and I was just starting out with this one classification.

The Court: Maybe he will submit a new list, and Mr. Field tomorrow morning could make his objections to the others, if any he has.

Mr. Field: Yes, we have some comments and objections on the other classifications, too.

[T. III, 46] The Court: I wonder how Mr. Holten, our research assistant, is coming.

Maybe if we recess for five minutes, we can come back and do it in ten minutes.

(Recess taken.)

Whereupon,

JOHN S. HOLTEN

resumed the stand and testified further as follows:

CROSS-EXAMINATION
(Continued)

By Mr. Field:

Q. Mr. Holten, have you found something else to show us?

A. I have not found anything in my file other than the letter and the report of Buell and Winter, the engineering Company that we previously referred to.

Q. Is there something more that you have been referred to by counsel that you want to comment on or have you finished your answer?

A. Let me say this, that I did not find a copy in my file of the prospectus concerning the bonds which I knew had been issued at the time, and the prospectus, I believe, although I haven't read it recently, had reference to the source of power.

Yes, it does.

Q. May I see it, please?

[T. III, 47] A. Yes.

Q. I believe one of the letters that we talked about and was identified and received in evidence is a letter from you to the city, I believe, sending the prospectus.

Do you recall that?

A. Yes, one of the letters did say that.

Q. Is this the prospectus there referred to?

A. I believe so.

Q. Now, could you point to the portion of that which you say has a bearing on the problem we have been discussing, for my benefit?

A. It has a bearing in this sense, that the purchasers of the bonds ought to know what the risks are in the case of revenue bonds, and this prospectus does have some statements about power not being presently available from the United States Bureau of Reclamation and about other power suppliers, and stating, assuming that the city would be able to purchase its requirements from USBR, the engineers have composed the following table of energy requirements.

Q. I see. So this is on the assumption that power is available from the Bureau?

A. Yes.

Q. There is no statement about the length of the commitment or anything of that kind?

A. That is correct.

[T. III, 48] Q. I guess that exhausts your search for anything in your file that would state that the Bureau of Reclamation's power was available for any particular length of time, am I correct?

A. Yes, that's right. The engineers had said there was a problem about getting power, power allocation from the United States Bureau of Reclamation, so that we then got this letter. But that is all we have.

Q. The letter being Exhibit 22?

A. Yes.

Mr. Field: That's all the questions we have.

Mr. Jaeger: We have nothing further, Your Honor.

The Court: You may step down. Thank you, Mr. Holten.

(Witness excused.)

Mr. Jaeger: One point of clarification. Defendant's Exhibit 22 is identical to Government's Exhibit 237, the same letter. I don't know whether it is necessary to have it in twice.

Mr. Field: What number was that?

Mr. Jaeger: 237.

The Court: Will there be any other exhibit problems in the future that Mr. Lundeen and [T. III, 49] Mr. Jaeger might anticipate and solve at the same time?

Mr. Anderson: This list here, Your Honor, represents our last as far as exhibits are concerned.

The Court: Are you going to have a lot of exhibits, Cy?

Mr. Field: We will have some associated with ones that counsel are offering if they are going to be admitted in some areas that I haven't talked about.

The Court: I thought that maybe this afternoon you could anticipate future problems and solve them all in advance, or try to.

Mr. Field: You mean as part of our case?

The Court: Well, if you communicate with each other about like problems.

Mr. Field: We have submitted our proposed exhibits, Your Honor, in accordance with the pretrial order.

Perhaps I should respond to Mr. Jaeger's statement that Defendant's Exhibit 22 is already in the record as No. 237, which, in turn, was Muller Deposition Exhibit No. 34.

In order not to have duplicate documents, I am willing to and suggest that Defendant's Exhibit 22 be [T. III, 50] cancelled as a part of the record, and that the examination of Mr. Holten that mentions Defendant's Exhibit 22 will be construed to apply to Exhibit 237, so we don't have duplicates in the record.

Does that make sense?

Mr. Anderson: That sounds good.

(Defendant's Exhibit 22 withdrawn.)

The Court: We will see you all tomorrow morning at 10:00 o'clock.

Thank you, gentlemen.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m., June 4, 1971.)

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[T. IV, 1]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

(Title Omitted in Printing)

The above-entitled matter came on for trial before the Honorable Edward J. Devitt, Chief Judge of the above-entitled court, at Saint Paul, Minnesota, commencing at 10:00 o'clock A.M., June 1, 1971.

The following transcript contains the proceedings of June 4, 1971.

(Appearances as heretofore noted)

* * * * *

[T. IV, 2] The Court: Good mor ing, gentlemen.

Mr. Anderson: The Plaintiff calls Mr. James Grahl.

Whereupon,

JAMES L. GRAHL,

a witness called by and on behalf of the government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Anderson:

Q. Mr. Grahl, would you give us your address, please?

A. My home address is 1222 East Highland Acres Road, Bismarck, North Dakota.

Q. And by whom are you employed?

A. Basin Electric Power Cooperative.

Q. How long have you been employed by Basin Electric?

A. Since July 1962.

Q. In what capacity do you serve at Basin Electric?

A. As the general manager.

Q. Mr. Grahl, when was Basin Electric Cooperative formed?

A. It was incorporated in 1961. I think it was May 1961.

Q. And where is Basin Electric Coop, Power Coop located?

[T. IV, 3] A. The headquarters office is in Bismarck, North Dakota.

Q. Would you tell us, Mr. Grahl, for what purpose Basin Electric Coop was formed?

A. It was organized by a group of rural electric cooperatives to supply themselves with power in addition to the power

that they obtained from the Bureau of Reclamation. The reason that they did this was because in the late 1950's the Secretary of Interior Fred Seaton informed them by letter that the Bureau supply of power would not be adequate to meet their load growth beyond about 1960 or 61; and then I believe it was in 19—early 1960's, the then Secretary of Interior Herb Udahl wrote them another letter and said they should be prepared to have a supplemental source of power by 1965, the fall of 1965.

Well, with those kind of warnings, the cooperatives proceeded to get together and form the regional cooperative to supply themselves with additional power.

[T. IV, 4] Q. After having done that, did they relinquish their allocations from the Bureau of Reclamation?

A. No. They still have them or are using them.

Q. And the Basin Electric's function is to supplement those?

A. Yes, we meet their needs over and above their Bureau allocations.

Q. Generally speaking, what is the geographical area encompassed by the membership of Basin Electric Cooperative?

A. The Class A members include cooperatives that are located in parts of eight states. Should I name the states?

Q. Yes.

A. Central and Eastern Montana; North Dakota; South Dakota; Western Nebraska; Iowa, Northwest Iowa; a few co-ops in Western Minnesota; parts of Wyoming and Colorado; parts of eight states.

Q. Does Basin Electric Power Cooperative presently have any generation capacity in operation?

A. Yes, we have a lignite fuel generating unit with a nameplate rating of 216,000 kilowatts near Stanton, North Dakota.

Q. When did that come on the line?

A. It went into commercial operation in January, 1966.

Q. Does Basin presently have any plans to construct additional generation?

[T. IV, 5] A. Yes, we are securing equipment and preparing specifications for a second unit in this same plant with a capability that is estimated at about 460,000 kilowatts, and we will start construction on that about April, 1972.

Q. When do you anticipate that that unit will come on the line?

A. It's presently scheduled for commercial operation in the fall of 1975.

Q. Does Basin Electric Power Cooperative presently have any of its own transmission facilities?

A. We have a little. We own about 12 miles of 230 kv transmission and this interconnects our generating unit to the Federal Transmission System, and we own about 12 to 13 miles of 115 kv line which supplies start-up power to our plant.

Q. Would you explain to us how you effect delivery of power produced by your generating units to your member cooperatives?

A. Yes. The studies that were made by the cooperatives in the 1950's indicated, and the Bureau of Reclamation confirmed this, that the Federal Transmission System had excess capacity of approximately 200,000 kilowatts. We rent that capacity from the Federal government for about a million dollars a year, and in exchange for that payment, the power from our unit is delivered to the co-op members.

Q. How does the power get delivered from the Bureau's [T. IV, 6] substations to the members' actual systems?

A. Well, we generally, not in all cases, but in most cases sell power to groups of distribution cooperatives called G&T cooperatives, and where their delivery points are on the Federal system, we make our deliveries to them at these delivery points or substations.

Now, there are a number of cases where the cooperatives get their power wheeled to them I think in all cases these would be private power companies, and so there, we make the deliveries to the substation on the Federal system that is nearest to this member cooperative and then the power is wheeled from there to the co-op delivery points.

Q. And the arrangements for the delivery from the Bureau substation to the co-op delivery point is a matter which is negotiated between the member co-op and the particular owner of the segment of transmission, I take it?

A. Well, it's not that simple. The Bureau of Reclamation has contracts with most of the companies under which the companies have agreed to wheel power that is scheduled by the Bureau of Reclamation, regardless of the source of the power, and it is through these contracts that most of the Basin Electric power is wheeled.

Now, where a new arrangement has to be made, it's the member's responsibility to negotiate the wheeling [T. IV, 7] arrangement. But if they ask us to assist them in the negotiations, we have done so. They pay for the wheeling and it's basically their responsibility.

Q. Is Basin Electric Power Cooperative broken down into different types of membership?

A. Yes, we have three types of membership.

Q. Will you explain what they are?

A. The Class A members are rural electric cooperatives or more accurately REA borrowers which have long-term

contracts for power with Basin Electric or intend to execute such long-term contracts.

The class—I will skip to Class C. The Class C members are distribution cooperatives which are members of these G&T or Class A members. The Class C membership is solely for voting purposes. It conveys no other rights and involves no other relationships, and these are voting rights that are used at annual membership meetings.

Then we have a Class B membership which is available for any entity that wishes to become a Class B member which may decide to buy some power on a short-term basis from Basin Electric.

Q. Are you familiar with the term long term firm power?

A. Yes.

Q. Are the sales that Basin Electric makes to its Class A members long term firm power sales?

[T. IV, 8] A. Yes, they are sales on contracts of 35 years' duration.

Q. How much of the output of the Basin first unit has been allocated at this point?

A. All of it to our Class A members.

Q. With respect to your prospective second unit, has there been any allocation of that power?

A. Yes. Now, I am speaking about firm power and I am not speaking about surplus energy or surplus short term firm or other surplus commodities, but in terms of the firm capability of our first unit and of our second generation unit and of the peaking power for which we have contracted with the Bureau of Reclamation. All of that has been divided up and allocated by contract to our Class A members.

Q. With respect to the Class B members is it contemplated that the sales of power to Class B members will be long term firm power sales?

A. No. We don't have any definition that says a certain number of years is short term and a certain number of years is long term, but in general, the answer is no.

Q. I take it that if a municipal electric system were to apply to the Basin Electric Power Cooperative for membership, it would come into the Class B membership classification?

A. A rural electric cooperative?

[T. IV, 9] Q. No, a municipal electric system.

A. Yes.

Q. Does the Basin Electric Power Cooperative currently sell any power to Class B municipal electric systems?

A. No.

Q. Has it ever sold power to Class B municipal electric system members?

A. No.

Q. Now, has Basin Electric Power Cooperative formulated any general policy to govern its response to requests from municipalities which are considering establishing a municipal electric system for power from Basin?

A. Yes. This is a matter that has come up periodically since we were organized and it has been discussed at board meetings and our general policy, first of all, is that Basin Electric does not engage in the promotion of municipal ownership. If a group in some city asks us if we could sell them power if they were to organize a municipal electric system, our policy has become one of saying that, first of all, they should attempt to buy power from their present supplier. And if that is not possible, to inquire of the Bureau of Reclamation, and if neither of those parties can or will sell them power, that we will sell them power to the extent that we have power available. But they need to make their own delivery arrange-

ments unless [T. IV, 10] they happen to be on or near what we call the joint transmission system, which is basically the Federal Transmission System.

Q. I show you GX-306, which is a letter from yourself to Harland Martinson of Elbow Lake, dated March 29, 1971, and I will ask you if this letter reflects the implementation of the policy you just described?

A. Yes, it does.

Q. As I understand this letter, and correct me if I am wrong, what you are suggesting is that Elbow Lake go first to Otter Tail Power Company and ask Otter Tail if it is willing to sell at wholesale?

A. Yes.

[T. IV, 11] Q. I take it, Mr. Grahl, that you have some familiarity with the Basin Electric Power Cooperative Bureau of Reclamation contract?

A. Yes.

Q. Could you very briefly, Mr. Grahl, tell us what benefits Basin Electric Power Cooperative derives from that contractual arrangement with the Bureau of Reclamation?

Mr. Field: That's an exhibit, isn't it?

Mr. Anderson: It is. I am referring to GX-235 which is the basic document, and I will give you that, Mr. Grahl.

The Witness: Well, I would say that the major benefits are, number 1, that we obtain a means of delivering the power from our generating plant to the member cooperatives which we serve.

Secondly, we have guaranteed backup for our generating unit from the Bureau in the event that the unit is off the line the Bureau picks up the load. We pay back the energy that the Bureau uses during such outages after we get back on the line.

In exchange for that though, I should say we give them right of first refusal on a great deal of low cost winter energy.

Thirdly, through year to year agreements which are associated with the contract, we have [T. IV, 12] worked out a pool arrangement for marketing surplus commodities, surplus energy, surplus short term firm out of our plant which is beneficial.

By Mr. Anderson:

Q. Mr. Grahl, are you familiar with something which has become known as the Northcentral power study?

A. Yes, I'm on the steering committee.

Q. Could you very briefly tell us what the Northcentral power study attempts to do, what its purpose is?

A. Well, the study was initiated at the request of the Assistant Secretary of Interior James Smith, I believe, about last May of 1970, and it's a group of about 36 power systems and in 13 states that have come together on a voluntary basis to make a joint study of what might be an advantageous power supply development between the period of about 1980 and the year 2,000 based upon large scale use of the coal fields in Montana, Wyoming and North Dakota; and the study is looking at what generating capacity might be advantageously built and what transmission facilities would be required to deliver the power to load centers primarily to the east.

Q. Now, does the membership of the Northcentral Power study encompass all segments of the industry?

A. Yes.

Q. Public and private?

[T. IV, 13] A. Yes.

Q. I believe you indicated you are a member of the steering committee of the power study?

A. Yes.

Q. Could you tell us very briefly what this steering committee's function is?

A. Well, the steering committee is the principal executive committee of the study and passes on and decides what the basic assumptions of the study should be and how the study should be conducted.

Now, these are matters that are under the general direction of the coordinating committee which is a much larger committee, but the steering committee is expected to essentially decide these questions and report its decisions to the coordinating committee periodically. So it works with the study manager in running the study.

Q. Well, now, has the steering committee directed any of its attention toward a suggestion by the Corps of Engineers that perhaps some one million kilowatts of peaking energy could be developed at dams on the main stem of the Missouri River?

A. Yes. The steering committee has and the subcommittees of the study have considered that proposed additional million kilowatts, as far as I know, the decision has been to set that aside and not consider it because of its estimated price of [T. IV, 14] about $330 a kilowatt.

Q. What's the problem with the estimated price?

A. Well, it's too high to be economically attractive. That's an investment cost.

Q. How low would it have to be in your judgment to be economically attractive?

A. Well, I think it's hard to say categorically. I think it would certainly be of interest if it were at $200 a kilowatt, but there probably is some intermediate figure where it might be of interest also. It depends a lot on what happens to the cost of other types of generating capacity.

Mr. Anderson, it occurs to me I can answer your question a little better. I am reasonably sure that one of the subcommittees in the Northcentral power study did in fact say that they would only consider potential hydrocapacity with an estimated cost of not more than $200 a kilowatt.

Q. Yes. What's the current posture of the Northcentral power study? What stage of the study are you now at?

A. It's at a point where most of the detailed work has been done and the committees are approaching completion of their analysis and data gathering and a number of the committees have prepared draft reports on their sections of the report, and the study report, final study report is scheduled to be completed by September of this year.

Q. Well, then, in short, as I understand it, the [T. IV, 15] Northcentral power supply study is an effort on the part of all the utilities in the region to get together and jointly plan for the region's bulk power supply in the future, is that roughly what it is?

A. Well, that isn't quite the way I describe it. The first phase is for them to get together and see if there would be some advantages in such joint planning. It's a joint study and investigation. If this first stage is encouraging to enough of the participants in the study then phase 2 would be actual joint planning.

Q. You are still in phase 1?

A. Phase 1 is what is supposed to be completed by September this year.

Q. I see.

Mr. Anderson: That's all I have, Your Honor.

## CROSS-EXAMINATION

By Mr. Field:

Q. Mr. Grahl, I will ask you a few questions and if I don't express myself clearly so you don't understand the question you let me know, will you?

A. Yes. I will.

Q. Going back to the formation of Basin Electric Power Cooperative which you say was incorporated in 1961, am I correct that in stating that Cooperative is financed for its [T. IV, 16] capital for the units that you have put in and other equipment under the REA Act under which Federal financing at 2 percent is available?

A. Yes. Except that with respect to our second generating unit, about 18.4 million dollars of that financing is to be provided by long loans from our member cooperatives, but otherwise it's REA financing at 2 percent interest, yes.

Q. What relationship is the amount that you mentioned that's coming from your member cooperative loans to the total investment in unit number 2?

A. The total investment is estimated at slightly over $117,000,000 so that 18.4 million is part of that, and I am afraid we are going to have an overrun in addition.

Q. So the money is coming either, I guess you might say, the major part from the REA financing, and to the extent you have mentioned from member cooperatives?

A. That is correct. Yes.

Q. And I gather from what you told us that some of the motivating factors in the formation of Basin, if I can call it that for short, and the planning and construction of your generating stations that you mention are periodic announcements

from the Bureau of Reclamation of the expectation of lack of power some time as the years go on?

A. Yes. That is correct. The initial announcements actually came from the Secretary of Interior, but I assume [T. IV, 17] they were initiated by the Bureau of Reclamation.

Q. I should have said the Department of Interior of which the Bureau of Reclamation is a part?

A. Yes.

Q. I believe you mentioned the first type of announcements of that kind being in the late 1950's?

A. Yes.

Q. And that Bureau power might not be available in sufficient quantities beyond 1961, if my notes are correct?

A. It was either 1960 or 1961. Yes, sir.

Q. Then in the 1960's another announcement came out that extended the potential date to 1965, is that right, sir?

A. Yes.

Q. And there have been some more announcements since then of the same type, have there not?

A. Yes.

Q. How many since that time?

A. Well, since that time the situation has changed. I am not sure I can answer the question because I don't really know, but, for example, there was a subsequent announcement, I believe it was after probably in the late 60's by either the Bureau or the Department of Interior that the combination of Bureau hydropower and thermal generating capacity either on the line or planned for the preference customers would meet their needs until about 1978, and then [T. IV, 18] just during this last year the Bureau of Reclamation has been informing preference customers like the municipal electric systems that the Bureau expected to meet their load growth

until 1977, but at that time they might actually reduce the amount of power that they could furnish to those systems thereafter. Now, those are the occasions that I recall.

Q. Then during your experience we have had what perhaps for convenience might be called, I guess, four occurrences or four cycles?

A. Yes.

Q. First the time limit beyond which you better look, you being the recipients of Bureau power, better look for more power as being 1961, the second in 1965 and the third in 1973 and now extended to 1977?

A. For some of the customers, yes.

Q. Yes. So it's been a recurring thing, hasn't it, as the years have gone on, this announcement from the Bureau expectation of a shortage or limitation of power?

A. Yes.

Q. Now, you have told us that you, you being Basin, have a generating station with a capability of 216 megawatts that's now on the line as has been since it went in to commercial operation from the date you stated?

A. Yes.

Q. And you have told us that what you call or classified [T. IV, 19] as long term capacity of that plant has been allocated to your members?

A. Yes.

Q. There is some power available, you have been selling power from that generating station to other entities than the membership cooperatives, have you not?

A. Yes. The plant has power and energy capability excess to the needs of our members and this is in decreasing amounts until our member load growth at least equals the capability

of the unit so that during the early years of plant operation we do have excess power and energy to sell.

Q. Well, take this last year, how much excess power have you sold to other entities that are not members of the Basin Coop?

A. Well, I don't recall the exact figures but I can put it this way. First I talk about kilowatts. The plant has the ability to deliver to these delivery points around the region a capability of approximately 170 megawatts. The difference between that and this name plate rating is taken up by reserves, transmission system losses and station use.

Out of that 170 megawatts in the winter of 1970-'71 we sold approximately 165 megawatts to our class A members. We had expected to actually load up the total capability with class A members' sales this winter but the peaks didn't [T. IV, 20] materialize that we had expected.

Now, on the energy production the ratio is different because we have, like any generator, a good deal more energy production capability than our members use on their normal load pattern. So I don't really remember how much energy we sold as surplus, but I suppose it might have been, oh, out of a billion and a half kilowatt hours, it was probably in the neighborhood of 700 million kilowatt hours.

But if I may add one thing, our cooperatives have a normal annual load factor of about 50 percent, so one would expect about half of our energy production to be surplus to their needs. It's energy produced during off peak periods.

Q. Before we go on with that last statement, you talked about the winter sales of kilowatts. The summer sales are of a different amount, are they, to your members?

A. Yes, they are. Members have a winter peak requirement and in the summer time their requirements are probably one-third less, thereabouts.

Q. So there is firm capability for marketing during the summer in excess of what you have told us there is in the winter?

A. That is correct. Yes.

Q. To whom are these sales made of both kilowatts and kilowatt hours that are not marketed to the cooperatives that are members?

[T. IV, 21] A. They are sold to the Bureau of Reclamation under a joint marketing arrangement that we have with the Bureau and with the extent that the Bureau finds that a market for these surplus commodities in addition to their surplus commodities they sell them and then pay us our prorata share of the revenue less a fee to the Bureau for their market.

Now, the Bureau sells most of these surplus commodities to the investor owned companies in the region and to a lesser extent to other cooperatives.

Q. And to municipals?

A. Well, I do not recall that, seeing any sales to municipals of these surplus commodities.

Q. Well, if we start out with this, the Basin Electric Power Cooperative sells all of its surplus to the Bureau of Reclamation?

A. Yes.

Q. Is that true?

A. That is correct.

[T. IV, 22] Q. They take it from there?

A. Yes, except that insofar as our shared sales are concerned, they give us a tabulation to whom those shared sales were made each month and what our share was, and I do not recall seeing any municipal electric systems on that tabulation, but there may have been. I do not think so, however.

Q. Is there any objection on the part of Basin if the Bureau does market some of that power to municipalities?

A. No, sir.

Q. Is the arrangement for the sale of your power which you call surplus power to the Bureau under this contract that was referred to as Exhibit 235?

A. I am sorry, did you ask me a question?

Q. I say, are there sales that you make to the Bureau pursuant to the provisions of this contract?

A. Well, more specifically, they are pursuant to letter agreements that we have with the Bureau which, if I recall correctly, are on a year-to-year basis. They can be terminated by either party with a year's notice. So the surplus marketing arrangements, I believe, are covered by such letter agreements. I am not sure there is any particular language in this contract one way or another on that.

Q. Would these letter agreements be some type of supplement or implementation of the basic agreement?

[T. IV, 23] A. I don't know. They are just letter agreements between ourselves and the Bureau, and I don't know whether one would call them supplements or not. I have never heard of them called supplements. They are simply letter agreements which I am sure are not inconsistent with our agreement.

Q. Is what you are telling us that you have a series of contracts with the Bureau by letter that are separate and distinct from your basic contract?

A. Yes, we have such letter agreements, yes, sir, but they are concerned with the subject you were asking about, the marketing of surplus commodities. Mr. Field, maybe I should add one more comment. When it comes to our surplus winter energy, the sale of that to the Bureau of Reclamation at their

option is an integral part of this contract; that particular transaction is a part of this contract.

Q. A part of this contract, Exhibit 235, and attached to it, apparently as an appendix or part of it, is the Missouri Basin Systems Group pooling agreement. Are you familiar with that? I suppose you are?

A. Yes.

Q. And that pooling agreement involves other systems than the Bureau system and your system?

A. Yes, it does.

Q. How widespread is that pooling agreement?

[T. IV, 24] A. Well, it includes a large number of systems, rural electric cooperatives, municipal systems, public power districts, the Bureau of Reclamation, and I believe some state agencies in that, about eight states, as I recall.

Q. All of the members of that pool are appropriately characterized as public power systems?

A. Well, cooperatives are not public power. They are privately owned corporations, but they are all, you could call them all consumer-owned or preference customers, if you wanted an overall term.

Q. You mentioned some public power districts?

A. Yes.

Q. In Nebraska, I guess that was?

A. Yes, that is right.

Q. And some municipalities are members, are they, of this?

A. There are quite a large number of municipal electric systems that are members.

Q. Of this pool?

A. Yes.

Q. Perhaps I could put it in reverse without getting into trouble with the language. There are no investor-owned systems involved in this pooling arrangement?

A. That is correct.

Q. And I presume that Basin gets some reciprocal [T. IV, 25] advantages in this pooling agreement in augmenting its resources?

A. No, I don't believe I would say it that way. The principal benefit to all of the members, including Basin Electric, is the opportunity it provides for joint planning, both on a short term and long term basis, but primarily long term for additional future power supply. But it's a planning group, and any specific arrangements between systems only come about through contracts between specific members.

Q. And have there been interchanges of energy between the pool members in this pool?

A. Well, I can answer it this way, that as far as Basin Electric is concerned, we have this contract and these arrangements with the Bureau of Reclamation, and during the first, I think it was two or three years of our plant operation, we sold short term power to what was then Consumer Public Power District in Nebraska and the Nebraska Public Power System, and while those two—come to think of it, I don't believe those two are members—they are members of the system excuse me. Now, I think those are the main power transactions that have taken place among members of the systems group. We also made a short term sale to Central Iowa Power Cooperative in the first year of plant operation. I think that is about all I recall.

Q. Like most pooling arrangements, there's the [T. IV, 26] opportunity, at least, and that opportunity apparently is realized in some instances where it is desirable, to either buy

or sell blocks of power between the members of the pool? Is that a fair statement?

A. Yes, although that really isn't an activity that is affected very greatly by the systems group, except to the extent that it brings people together and gives them an opportunity to exchange information. But it's primarily for joint planning purposes for future power supply.

Q. Anyway, Basin did sell a block of power to the Nebraska Public Power District?

A. That is correct, over a period of two or three years.

Q. Do you still have arrangements to supply the Nebraska Public Power District?

A. No. We completed our deliveries under that contract, I believe it was in the spring of 1968.

Q. Did the joint planning that you mentioned, being one of the benefits of this pool, involve some joint thought and planning which included your now newly planned 400 megawatt plus plant?

A. Yes, it did.

Q. And did it also involve the planning of what I understand is a 500 megawatt plant of the Nebraska Public Power District?

[T. IV, 27] A. Yes, it did. That is an 800 megawatt plant.

Q. Eight hundred, thank you, sir. Those things were part of some joint planning?

A. Yes, that is correct.

Q. Those two plants are presently either definitely planned or under construction?

A. Yes, that is correct. The 800 megawatt Nebraska unit is under construction and our unit will be under construction as of 11 or 12 months from now.

Q. Are there other generating units as a result of that joint planning that are presently developed, planned or under construction?

A. No. Those were the two units. In addition, there was a substantial amount of 345 kv transmission lines jointly planned.

Q. Are all of these joint plans looking towards the planning for and providing for the increasing source of power supply and transmission between what I would call public power and you call cooperatives and consumer-owned, and so forth, utilities in this pooling agreement?

A. Yes, that is correct.

Mr. Field: I ask to have this multi-paged bound document marked as an exhibit as part of the cross-examination of this witness.

(Defendant's Exhibit 23 marked for identification.)

[T. IV, 28] By Mr. Field:

Q. I will show you what has been marked as Defendant's Exhibit 23, and I presume you are familiar with it?

A. Yes, I am.

Q. So you don't need to look at it?

A. I might need to, but I am familiar with it.

Q. It's stated to be published by the Planning Committee of the Missouri Basin Systems Group. Is that essentially the group we have been talking about?

A. No. This is an entirely different organization. The group that we were talking about—I am sorry, you mean just within the last few minutes?

Q. Yes.

A. Yes, yes, that's correct. It's the same organization that you have been talking about.

Q. That's in the pool we have been referring to?

A. Yes.

Q. In other words, the members of this group are the type of members we have discussed and had a little difficulty with in description?

A. Yes, that is correct.

Q. Does this Exhibit 23 represent as of its date, July 1970, some of the joint studies and planning that the group was interested in and undertook that you have referred to?

[T. IV, 29] A. No, not exactly, because this is a reconnaissance study which outlines possible regional power systems that might be developed, considering the estimated future power requirements in the area. But this is sort of a prospectus or general look at what it might be. When it comes down to the specific joint planning in which we participated with Nebraska Public Power District, that is more specific and probably will turn out to be more limited than these possibilities that are outlined in here.

Q. Apparently I didn't describe the document very accurately. It isn't a joint study of a specific project?

A. No.

Q. But it's a study of the needs and potentials and some suggested areas of further study to reach certain goals?

A. Yes. As a matter of fact, on a small scale it's exactly the same kind of study that the North Central Study is for a larger group.

Q. I was going to come to that a little later. I rather suspect this is being carried on in substance by the larger study of the North Central Power Study?

A. That is correct.

Q. The studies that are involved, if I can call them studies without getting into verbal difficulty, planning studies of some kind that are illustrated in Exhibit 23 involve in large

degree, don't they, plans for the [T. IV, 30] implementation of both thermal and hydro power?

A. Yes. I think everybody tries to put hydro and thermal together in the optimum combination.

Q. So that the record will be a little more explanatory in what we are talking about, hydro, of course, is water power?

A. Yes.

Q. And thermal involves both coal fired and nuclear, does it?

A. Yes.

Q. And the combination of the use of those two sources of power in getting the optimum use, does that involve using the hydro power primarily for peaking and the thermal units for base load?

A. Well, I can't say that it's primarily. This is a good combination, but it's often not possible to use all the hydro as peaking capacity, but this is a good combination whenever you can fit it together.

[T. IV, 31] Q. Hydro has characteristics that make it peculiarly good for peaking purposes, does it not?

A. That is right.

Q. What are they so we can understand it?

A. Well, it's due to the fact that there is no way of storing large amounts of electric energy so that, generally speaking, the electric power that's produced has to be used and you have a one to one relationship between consumption and production.

Now, with the hydro system where you have a large reservoir in which you can store water, the reservoirs can be used as though they were big storage batteries and the water released at times of peak requirement and then stored in times of low electric demand.

So that the hydro, therefore, can be used to take the ups and downs of the consumers' requirements and then the plants that are fired thermally nuclearly or coal fired can be base loaded and operated at a steady load which this is the most efficient way to operate a thermal plant.

Q. The term base load is probably a term that those in the industry understand clearly. Would you describe your understanding of that term?

A. As I understand it, it means that if you operate a plant at base load, you operate it at approximately its full capability around the clock day in and day out to meet that [T. IV, 32] part of a power load which is always there even at 2:00 o'clock in the morning and then the hydro takes the load fluctuations.

Q. The hydro also has the advantage for the peaking purposes you have described because it can be started up momentarily?

A. Oh, yes. Very quickly.

Q. And along that same vein, we hear a good deal or hear some, anyway, about pump storage reservoirs for generation of electricity. They serve the same purpose, don't they, in providing hydro power for peaking purposes in the main?

A. Yes. Generally.

Q. Now, to get some conception of the scope of the studies that are going on, and referring back to 1970 when the Missouri Basin systems published this Exhibit 23, I presume their study is largely centered on the Missouri Basin, isn't it?

A. Yes.

Q. Whereas the North Central power supply study is a wider geographical scope?

A. Yes. It's somewhat wider. It's based upon the same coal resources however.

Q. Well, I am going to refer you to certain parts of this exhibit and just for the purpose of a question, I have no intention of skipping over any part of it, but I have [T. IV, 33] turned to page 28 which has the heading, "Description of Plans," then, "Missouri River Basin," and I will quote a sentence or two.

"Seven plans were developed for delivering project energy to transmission substations in the Missouri Basin. The first two are Stage 1 programs, including 3200mw of thermal and 1200mw of peaking, for an integrated total of 4400mw. The last five plans are Stage 2 programs, including two 4400mw stages for a total generating capacity of 8800mw."

Is that a fair description of the general reconnaissance stage of planning that the Missouri Basin systems group was thinking about at that time?

A. Well, I don't know how to answer that. It's a fair summary of the plans in this book, but it doesn't represent any settled planning or agreements. The purpose of this book is to outline the possibilities for large scale joint planning which brings about economies that one does not get when planning and power supply is provided on a smaller scale.

Q. I didn't mean to infer this was a definite commitment.

A. Yes.

Q. But this is in general the scope of the thinking?

A. Yes.

Q. In looking at these plans?

A. Yes. That is correct.

[T. IV, 34] Q. For additional power resources?

A. Yes.

Q. This being relating to the Missouri River Basin?

A. Yes. I believe the State says a matter of fact are indicated in those plans.

Q. The what?

A. The States that are involved.

Q. Oh, yes. So we understand, I suppose we do by this time, the term megawatt, that's a thousand kilowatts, is it?

A. Yes.

Q. So when we are talking about 8800 megawatts, that is 8,800,000 kilowatts of capacity we are talking about?

A. Yes. Now, this is over a period of years. This isn't—

Q. I just wanted to explain the term.

A. Yes.

Q. Did I do that correctly?

A. Yes.

Q. Is the Bureau of Reclamation a party to this or a member of this Missouri River Basin systems group?

A. Yes, they are.

Q. And participated along with the rest of the entities you mentioned in making this study that has resulted in this Exhibit 23?

A. Well, I don't know that they participated very [T. IV, 35] greatly. The study was put together primarily by the executive director Robert Maris with the help of some consulting engineers and it was not the kind of joint study that we ordinarily do where the individual utilities contribute manpower and do a group study.

Q. Well—

A. It was more like a staff study.

Q. I appreciate your comments, but whether they did the foot work or the engineers or Mr. Maris did the major labor involved they were a part of the group that produced the result?

A. That is correct. They are a member of the planning committee.

Q. Now, as you have already told us, this Missouri Basins Systems Group reconnaissance study, the general outline of it has been carried forward on a wider scale by the North Central Power Supply Study?

A. Yes.

The Court: This may be an appropriate time for us, Mr. Field, to recess for about 10 minutes.

(Recess taken.)

[T. IV, 36] By Mr. Field:

Q. At recess time, Mr. Grahl, we were passing on, I believe, to the North Central Power Study, and you are on the steering committee of that study?

A. Yes.

Q. And is that the study of which Mr. William F. Graham of the Bureau of Reclamation is the study manager?

A. Yes, that is right.

Mr. Field: Would you mark this, please?

Mr. Anderson: I have not seen that before.

Mr. Field: Do you want to look at it more?

Mr. Anderson: No.

By Mr. Field:

Q. I show you this document marked Defendant's Exhibit 24. You can ignore the penciled notations on it. I suppose they should be considered as being not a part of the exhibit. Not as to this particular copy, but are you familiar with that document?

A. Yes, I think I have seen it. They put out so many memos that I am not positive, but I think I have looked at this one.

Q. It appears to be a communication from William F. Graham, the study manager, to the coordinating committee and [T. IV, 37] participants of the North Central Power Study under date of May 17, 1971, which is fairly recent, and

that's the reason we picked it out. It is a recent one, isn't it?

A. Yes.

Q. And from time to time, I suppose, there are progress reports?

A. Oh, yes, there are a great many.

Q. And this states that it is the fifth progress report?

A. Yes. They issue a lot of other memoranda in addition.

Q. In direct examination you responded to questions as to the purpose of the study and its present status and anticipation of the culmination of the work, and so on. Exhibit 24 is perhaps the most current progress report of what you were talking about? Is that not true?

A. Well, I suppose it is. I can't say absolutely that it is the most recent, but it's certainly a recent one.

Q. Now, in general, what is the geographic scope—it's larger than the Missouri Basin Systems Group, and how much larger is the North Central Power Study Group?

A. In terms of geography it encompasses part, if I recall correctly, parts of 13 states. The systems group deals with parts of about eight states. The eight states, I believe, are all included in the 13 that the North Central [T. IV, 38] Power covers.

Q. In terms of the scope of potential power resources that are being talked of and which have reached the stage you have told us about at the moment, what is the scope of the megawatts or kilowatts, both thermal and hydro, that are involved in this planning?

A. Well, it's very much larger, and I do not remember the figures. If I recall correctly, however, the steering committee decided that they would develop these studies and the possibilities is based on the assumption that the participants might decide to obtain, I think it was, about a third of their additional future requirements through this kind of a joint effort, and

this was an assumption made solely for purposes of making a study. There is no commitment that anybody will obtain any power through such joint action, and it seems to me that the third amounts to about 20 million kilowatts, 20,000 megawatts. But this is between 1980 and the year 2000, so I suppose you are talking about total requirements in the order of 50 million kilowatts, total additional requirements between 1980 and the year 2000. This is my recollection. I am not sure if am exactly right on the figures and I might be quite a ways off.

Q. Thank you for that information. These planning studies are the stage that things go through before they reach the point where consideration is given to particular [T. IV, 39] projects? That is the purpose of them?

A. Yes, sir, to see what the possibilities are, and so on.

Q. As you told us, the North Central Power Study is looking forward to the year 2000, is it?

A. Yes.

Q. You spoke of the possibility in your direct examination of additional hydro electric installations in the main stem dams on the Missouri River and stated there were some observations of one of the committees that the estimated cost was $330 a kilowatt and so that more or less was put on the shelf, at least for the time being?

A. Yes.

Q. Is this true, Mr. Grahl, that the studies of whether or not to put in additional hydro power in the main stem dams of the Missouri River is primarily within the scope of the Corps of Engineers for study?

A. Well, the Corps is making such a study, and one of the purposes of the study they are currently making is to come up with what the costs will be.

Q. So that study of the Corps of Engineers of that additional hydro power on the main stem dams on the Missouri River is still going forward?

A. Yes.

Q. Under the study of the Corps of Engineers, who [T. IV, 40] would undertake the project if it was undertaken?

A. Yes, that is their intention.

Q. We don't know the final answer on that question, do we as of now?

A. That is correct.

Q. The study encompassed in the North Central Power Study as of this progress report, Defendant's Exhibit 24, if I read it correctly, involves a study of a total of three million kilowatts of hydro peaking capacity in different locations on the Missouri River?

A. Yes. One of the assumptions the steering committee adopted is that would not be Federal capacity, however.

Q. Whatever it is, the amount of it under consideration is 3,000 megawatts or three million kilowatts of hydro capacity?

A. Yes, that is the assumption.

Q. In the general planning, that would be used for what we described as peaking along with base load thermal plants?

A. Yes, that is correct.

Q. Does the North Central Power Study as well as perhaps others also in major part involve thinking and planning of base load thermal plants at what we call mine mouth locations?

[T. IV, 41] A. Yes, in the coal fields.

Q. Where there are large deposits of coal?

A. Yes, that is correct.

Q. In general, where are the mine mouth plant sites that are under consideration?

A. I don't recall the exact locations, but they are in Eastern Wyoming and Eastern Montana. I am not sure whether there are any left in North Dakota or not. Those would be the primary areas.

Q. There is a reference on page two, and I am not asking this in any contradiction of what you just said, but just to refresh your recollection, perhaps, as far as North Dakota is concerned, page two, paragraph 37(a) refers to comparing costs of 3,000 megawatt development on the Knife River near Beulah with a similar installation in the Gillette, Wyoming, area, so there is some consideration being given to another base load plant in North Dakota, then?

A. Well, except that at the next steering committee meeting they decided it would be more economical to install a capacity in one only and build transmission all the way across North Dakota to Minneapolis, most of these loads to serve projected requirements of investor-owned companies. That is why Minneapolis is a load delivery center.

[T. IV, 42] Q. Well, the study is made for the power resources of all of the segments of the industry, isn't it?

A. Oh, yes.

Q. You didn't mean to infer these mine mouth plants were being considered just for one segment, did you?

A. No.

Q. Or the hydro plants either?

A. That is correct.

Q. Yes. I presume the next expected stage of a study of this kind after the report of the North Central Power Study is made is to perhaps make some preliminary projections and decisions as to how it might be carried out by anyone or a number of participants?

A. The next step is supposed to be one in which the participants will take the results of this study and they will, for their own system, decide it would be better for them to join with others in mine mouth generation in western coal fields, or let us, say, build additional plants in our own service area, or pursue some other alternative and each system will make this evaluation and then those that want to go together presumably will get together and to pursue some specific joint planning.

Q. This will hopefully furnish a base for that type of evaluation then?

A. Oh, yes.

[T. IV, 43] Q. And decision?

A. That's the purpose.

Q. That's the purpose of it?

A. Yes.

Q. I suppose it goes without saying by virtue of what we have already covered that both Basin Electric Power Cooperative and the Bureau of Reclamation are participants in this North Central Power Study?

A. Yes. That is correct.

Mr. Field: Perhaps this is an appropriate time to offer Exhibits 23 and 24 as part of the cross examination of the witness.

(Defendant's Exhibits 23 and 24 offered in evidence.)

The Court: Absent objection, it may be received.

Mr. Anderson: No objection.

The Court: It may be received.

(Defendant's Exhibits 23 and 24 received in evidence.)

By Mr. Field:

Q. Now, coming to another area of your examination, Mr. Grahl, you mentioned municipalities, I believe you told us, not

being served by Basin Electric Power Cooperative, not that you wouldn't serve them but that you didn't have any [T. IV, 44] that you were serving?

A. Yes. That's correct.

Q. And counsel on your direct examination called your attention to Exhibit 306 which is a rather current letter written May 29, 1971 and asked you some questions about it.

Now, this exhibit 306 refers to a prior exchange of correspondence on this same subject matter including a letter from Basin Electric Power Cooperative to Elbow Lake dated April 28, 1967?

A. Yes.

Q. Do you recognize that?

A. Yes.

Q. And is Exhibit 304 in this case the letter there referred to?

A. Yes, it is.

Q. You are familiar with those, I guess you wrote one of them, didn't you?

A. Yes. I signed them.

Q. Now, calling your attention to Exhibit 304, the 1967 letter which is addressed to Mr. Harland Martinson, Secretary of the Power Commission of Elbow Lake from yourself, I just quote a part of it for the purpose of the question.

"Pursuant to your request, this letter will serve to advise you that Basin Electric would furnish firm power and energy to the City of Elbow Lake, at wholesale, in such [T. IV, 45] quantities and for such considerations as may be subsequently agreed to mutually by Basin Electric and Elbow Lake. We propose that the term of a contract for such service be for a period of five (5) years with provisions for yearly extensions

by mutual agreement upon three years notice prior to the termination dates."

That was Basin's proposition to Elbow Lake?

A. Yes.

Q. And is the same proposition, you say, in Exhibit 306, that is as of March 29, 1971, under the circumstances you relate here, Basin would renew its offer of April 28, 1967?

A. Yes. With a higher rate.

Q. I was coming to the rate, Mr. Grahl. In the 1967 letter, Exhibit 304, you quote a rate which is labeled Class B rate, is that true?

A. Yes.

Q. Now, in the 1971 letter, you refer to the fact that you, that is Basin, has put into effect a rate increase of about 9.5 percent. Concentrating on that for a minute, when did that rate increase go into effect?

A. I believe it was July of 1969.

Q. So you say the rate would therefore be higher but the next sentence, if I can quote and then ask you a question about it, "It would be the rate in effect for Basin [T. IV, 46] Electric's Class A member cooperatives."

Do we understand that then you are now offering Elbow Lake the same rate as your Class A member cooperatives?

A. Well, that's what we did. As a matter of fact, this rate here which is called Class B rate was the same rate as we at that time were charging our Class A member cooperatives.

Q. Well, I just called your attention to the fact, and I'm not disputing your statement at all, Mr. Grahl, but in the 1971 letter Exhibit 306 you say it would be the rate in effect as of that time for Class A member cooperatives, is that true, is that the rate you are offering them?

A. Yes.

Q. Is it the same as the Class B rate now?

A. Actually we don't have any Class B rate, and I cannot explain to you why that term was used in that letter.

Could I expand on that a little bit, if you would like me to? We have sold power to Class B members during the first two or three years of our plant operation at a different and lower rate than our Class A rate, but I don't recall that we had a name for it, and that those were the sales to Nebraska and Central Iowa Power Cooperatives, and I really, honestly don't remember why that reference there was made to a Class B rate.

Q. In any event, Mr. Grahl, these two exhibits are the illustrative, are they not, of the willingness of Basin [T. IV, 47] Electric Power Cooperative to sell power and energy to municipalities and in Elbow Lake's case at the same rate as your Class A member cooperatives?

A. Yes. To the extent we have it available above our members needs, our Class A members needs.

Q. Well, whatever the background of it is you offered to serve them?

A. Yes.

Q. At Class A rates?

A. Yes.

Q. Yes. And I presume being in the electric business you understood Elbow Lake was looking for a firm source of power?

A. That is what they told us, yes.

Q. Now, you have told us that you furnished power to your member cooperatives, they include both what's called G and T Cooperatives as well as the distribution cooperatives?

A. Yes. We have some distribution cooperatives that do not belong to those G and T groups and who therefore are

direct Class A members with Basin Electric. Most of the distribution groups are members of these G and T groups and our contract arrangements then are with the G and T cooperative.

Q. After you sell the power to your member cooperatives, whether it be G and T or distribution groups, do you follow [T. IV, 48] through to see what they do with that power and whether they serve municipalities with it?

A. We are aware of what they do with it and whether they serve municipalities with it. I don't know that I could say that we have any formal procedure set up for that, but we certainly are aware of it. Yes.

Q. You are aware then that some of the cooperatives do serve municipalities?

A. Yes.

Q. Your members?

A. Yes.

Q. So what you were telling us before in your direct testimony, to get it in perspective, is that Basin Electric Cooperative at least up to now hasn't sold any direct to municipalities but some of your electric power and energy can well reach municipals through your member cooperatives?

A. Yes. Now, I only recall one case and that's the case of Elk Point to which the East River G and T supplies power. I am not aware of any other municipal electric system in that category. You are correct with respect to Elk Point.

Q. I wasn't referring to any particular town for the moment.

A. Yes.

Q. I will in a few minutes. My question is directed [T. IV, 49] to the fact that your member cooperatives to whom you

sell power as far as you are concerned could and in some instances do supply power to municipals, is that true, sir?

A. Yes.

Q. And East River Electric Cooperative is one of your members, isn't it?

A. Yes, it is.

Q. That's a so-called G and T?

A. Yes.

Q. I guess that's a shorthand expression for Generation and Transmission, G and T, is it?

A. Yes.

Q. And I guess it doesn't in all cases mean that they have both of those functions?

A. That's right. With one exception none of them have generation.

Q. It signifies more a sort of an intervening link on a, perhaps a wholesale basis, or something?

A. Yes. Yes, sir. They were originally organized to look after the wholesale power supply requirements of their distribution coop members and in the Missouri Basin these G and T's then decided instead of building a multiplicity of small plants, to themselves federate into Basin Electric, and then have Basin Electric build a smaller number of large, efficient units to supply the whole group. So that's why they [T. IV, 50] didn't get into the generation business themselves.

Q. Yes. So when we use that term we will understand—

A. Yes.

Q. —it's shorthand for that type of cooperative?

A. Yes.

Q. Well, now, just taking the East River Electric Cooperative as an example of that situation, you supplied power and energy to East River directly?

A. Yes.

Q. And then East River had several distribution REA cooperatives as its members?

A. Yes.

Q. Which may not be and probably aren't members directly of Basin?

A. Well, most of them are these Class C members which is only—

Q. I see.

A. Only a voting mechanism.

Q. They may have some membership then?

A. That is right but not contract relationship.

Q. Now, Sioux Valley Empire Electric Cooperative—I may not have the name just right—

A. Yes, sir.

Q. You are familiar with that distribution cooperative, are you?

[T. IV, 51] A. Yes.

Q. That's one of the members of East River Electric Cooperative, is it not?

A. Yes.

Q. So the chain of supply of power from Basin to Sioux Valley would go first from Basin to East River and from East River to Sioux Valley?

A. Yes. That is right.

Q. There is testimony in the case here that Sioux Valley has been furnishing some kind of services, wheeling and management or maintenance services to the municipalities of Colman and Aurora. They happen to be two towns that were previously served by Otter Tail so there is testimony in this case concerning it. Are you familiar with that situation?

A. No. I am not.

Q. I guess what East River and Sioux Valley, just for illustration, do when they get the power is up to them, is that true, Mr. Grahl?

A. Well, no. I don't think so because REA has something to say about what they do with the power that comes out of REA financed facilities.

Q. Let me ask it this way. I didn't ask it very appropriately. They can do what they please with it as far as you are concerned, as far as Basin is concerned?

[T. IV, 52] A. Well, I don't know that I cannot answer that because—let me say it this way, it has not become an issue. I suppose circumstances might arise where it would.

Q. That is up to now you haven't tried to police them to see whether they sell only to their consumers, their members I should say, but also to municipals, you haven't tried to police that situation?

A. No. I think that's a fair statement, but there hasn't been much of anything to police as far as I know.

[T. IV, 53] Q. Well, perhaps that is an unfortunate term. To follow you, you don't have any procedure to do that, do you?

A. Well, maybe I should try to get at your question in my own way. We have close relationships with our members like East River on planning ahead for what power supply will be required and the basis for this planning ahead are the load forecasts with future years' needs at East River and others supplied to us. Our engineers work with them directly. These load forecasts are subject to review by REA and us and we also check them out with the Bureau of Reclamation so we know pretty well what is included in these forecasts.

So if there was a substantial change in their plans as to who they were going to supply, we would become aware of it in the

course of this forward planning, but we do not have a formal procedure whereby they have to check with us before they supply an additional load.

I don't know if this answers your question, but it's a hard one for me to respond to because it isn't something that we become involved in.

Q. Perhaps I could ask this question.

Has there ever been an instance where you have turned down or revised the load forecast from any of your members because it included service to a municipality?

A. No.

[T. IV, 54] Q. There is a situation going on currently that has been inquired of from at least one other witness by deposition, and that is at White, South Dakota.

Do you know of the existence of such a town?

A. I never heard of it. White?

Q. Yes.

A. No. I am not familiar with that at all.

Q. To make sure that I make myself clear in refreshing your recollection, if it does do that, White, South Dakota, is a town, perhaps I could call it in the Colman area, it's in the Sioux Valley Empire Electric area. It is presently being served at retail by Otter Tail Power Company. The town recently, as of June 1, 1971, while this trial is in progress, held an election at which a proposed municipal distribution system was approved by the voters, as reported.

There is no local generation provided for in their plan for a municipal system.

A witness whose testimony was taken by deposition last week and who is knowledgeable and works for the Bureau of Reclamation, denied any commitment from the Bureau of Reclamation for service to White.

For the purpose of the question, I will hypothetically ask you to assume that Sioux Valley Empire Electrical Association is going to furnish the service to White if they put in their municipal system, which, in turn, [T. IV, 55] presumably would come from East River as a source of power. Does that refresh your recollection at all? Do you know what is going on?

A. As I remember, I have never had any knowledge of this, and as a general rule, we do not concern ourselves with that kind of local issue.

Q. I am not speaking of the issue. I am talking about the source of power. Do you concern yourself with that?

A. No, sir, I personally know of no communication from anybody about White, South Dakota. I was not aware of the fact that it existed. Now, I cannot say that nobody in our staff has never been contacted, but I think they would have told me if they had been.

Q. So if, in fact, Sioux Valley or East River or the two of them in combination have made a commitment to White to take care of their service, it's their commitment—

A. I am not aware of it.

Q. You are not aware of it?

A. No, sir.

Q. These things could happen, and I presume appropriately so, so far as the co-ops are concerned that I mentioned and others like them?

A. Well, yes, they could happen.

Q. If that is the situation in White, it has happened, [T. IV, 56] is that true, sir?

A. I don't know. I don't know anything about that.

Mr. Anderson: I don't see any point in pursuing the question, Your Honor.

The Court: I don't either, Mr. Field. I think we have covered White pretty well.

Mr. Field: That is all I am interested in, covering the point.

The Court: I think it is well covered.

Mr. Field: I am not intending to pursue it any farther, but the point I am trying to make, Your Honor, is that some statements were made that Basin Electric Cooperative was not furnishing power presently to municipalities, whereas in fact through their member cooperatives we think the facts are that they do.

The Court: I guess he didn't even know that White existed until this morning.

Mr. Anderson: There is no evidence of how White will get power anyhow from the record.

By Mr. Field:

Q. Are you familiar with a municipality by the name of Maddock, North Dakota?

A. I have heard of it, but I can't say I am familiar with it.

Q. You are familiar with Baker Electric Cooperative, [T. IV, 57] I assume?

A. Yes. That is a member of Central Electric Power Coop.

Q. You spoke of load forecasts coming to your attention based upon the needs of your cooperatives. In connection with Central Cooperative's needs or its member Baker Electric Cooperative, has the service to Maddock been included in those forecasts?

A. I don't know, and we have yet to sell kilowatt hours to Central Electric Power Cooperative. They have not exceeded their Bureau allocation.

Q. I see. Do they make forecasts to you?

A. Yes, and I really don't know whether they have included the City of Maddock or not.

Q. Speaking of your cooperatives exceeding or not exceeding their Bureau allotment, some of Basin power goes to Bureau, doesn't it?

A. Oh, yes, I see what you mean. Some of our surplus energy has gone to Central through the Bureau, strictly as replacement energy because it was cheaper for them to buy surplus energy than to operate their generating plant. I should have said that we have sold them no firm power.

Q. A few more questions in this area, Mr. Grahl.

The municipality of Cando has been called to my [T. IV, 58] attention, which I am told is served by Baker Electric Cooperative. Are you familiar with that?

A. I have been there, but I honestly am not familiar with the arrangements between Cando and Baker.

Q. As far as you are concerned, that is in the same situation as Maddock?

A. Yes.

Q. Calling your attention to another distribution cooperative, Tri-County Electric Cooperative, is that a member of the G&T or direct member of Basin for supply of power?

A. Well, this is the one in South Dakota?

Q. I think—

A. There is a Tri-County in Wyoming and Tri-County in South Dakota.

Q. North Dakota.

A. Tri-County North Dakota, yes. That is not a direct member. That is a member of—well, it is a member in part of Central Electric Power and in part of a group called Dakota Electric, which is a paper G&T; in other words, it's sort of a contractual entity.

Q. Do they have transactions?

A. Yes. I think we sell them some power to some of their delivery points that are included in the Dakota Electric group, but I really don't remember for sure. Some [T. IV, 59] of our membership arrangements are more complicated than they have any right to be.

Q. Calling your attention to the communities of Buchanan and Pingree, Edmonds and Woodworth, which are served, according to my information, by Tri-County, are consumers in those municipalities included in any load forecasts?

A. I don't know, but I don't believe those are municipal electric systems. They don't sound familiar to me. Those may be communities that are served directly by the cooperatives.

Q. Do you know what the situation is?

A. No. There are only about seven or eight municipal electric systems that I have been aware of in North Dakota.

Q. Well, do you know these communities?

A. No.

Q. Whether they are called communities or some other designation, are they included in the forecasts?

A. I assume that they are. I assume that they are, yes.

Mr. Anderson: Just as a point of clarification, are you talking about Woodworth, North Dakota, Mr. Field?

Mr. Field: Yes.

[T. IV, 60] Mr. Anderson: That's the town that Otter Tail sold to, as I understand, Tri-County, is that the town you are talking about?

Mr. Field: Yes.

Mr. Anderson: All of which is reflected in the stipulations?

Mr. Field: Yes.

The Witness: May I—I don't want to seem unresponsive, but where a community is simply a part of the total load of a cooperative, we do not make distinctions between whether the load is a load to a farmhouse or whether it's a load to a summer cottage or whether it's a load to a residence in a community, and I don't think these are municipal electric systems. I think they are a part of the regular membership of the cooperative, and so this is why I have difficulty answering your question because we don't break down the loads by their, oh, in that way.

By Mr. Field:

Q. Do you break it down if they are municipals that are served by the cooperatives?

A. No. I don't think that we do except that if a Class A member were to become a supplier to a significant number of kilowatts that were in municipal electric systems, we would certainly become aware of that.

Q. What is significant?

[T. IV, 61] A. Well, I don't know.

Q. Well, I guess we pursued that long enough. The general situation is that you furnish power to your member cooperatives and then they dispose of it pretty much as they see fit?

A. Except that both Basin Electric and our members have to comply with the REA regulations on this matter.

Q. That's something in somebody else's hands besides yours?

A. Well, it would be a problem for us if it arose because if my understanding of the law is correct, neither members nor ourselves can make long term contracts to sell REA-financed capacity to non-REA borrowers. So that if we undertook to supply a member which was engaged in an activity that the REA would not approve, we would sooner or later be,

in effect, in non-compliance with the REA regulations also, but I don't know how else to answer your question.

Q. Well, you are conscious of the fact some of these things are going on, perhaps the amounts aren't significant in your opinion?

A. That is right. And we have had power surplus to our member needs so that there hasn't been an issue raised.

Q. A further question, Mr. Grahl, appropriate to your [T. IV, 62] last answer I believe. This proposal you made to Elbow Lake, that is Basin Electric Cooperative made to Elbow Lake in 1967 and renewed in 1971, Exhibits 304 and 306, that you classified as a short term arrangement?

A. Yes. Five years.

Q. Subject to extensions from year to year?

A. Yes. That would be by mutual agreement. In our case one of the considerations would be whether we expected to have power available over and above our Class A member's needs.

Q. But the proposition is initially for five years?

A. Yes.

Q. Subject to extensions?

A. Yes, sir.

Q. Where do we draw the line between long term and short term?

A. Well, I have asked our own general counsel that question, and I don't know. We have regarded five years as short term. Now, if somebody came along and wanted to negotiate a ten-year contract, we would have to resolve that question, but that question has not come up.

Q. Well, a municipality that is looking for firm power and gets what you call and classify as a short term commitment for five years subject to extensions, it's a situation that could

well continue on and on so that municipality has [T. IV, 63] its supply of power, that's true, isn't it?

A. It could. Yes.

Mr. Field: That's all we have, Your Honor.

## REDIRECT EXAMINATION

By Mr. Anderson:

Q. Just a very few questions, Your Honor. Mr. Grahl, you and Mr. Field had a brief colloquy concerning the Missouri Basin Systems Group, and Mr. Field referred to the pooling aspects of the Missouri Basin Systems Group. Now, do the members of the Missouri Basin Systems Group actually have any formal pooling agreement?

A. Well, they have a pooling agreement but it is a loose form of organization. It's not a tight pool except for such contract arrangements as exist between individual members like between Basin Electric and the Bureau, but it's primarily a planning group.

Q. The only actual pooling that goes on is the pooling that goes on pursuant to the contractual relationships between, for example, Basin and the Bureau?

A. Yes.

Q. Basin and Nebraska?

A. Yes. That is correct.

Q. Well, now, moving to something else down in Nebraska, I think reference was made to an 800 megawatt unit [T. IV, 64] to be built by a Nebraska Public Power organization. Do you know how the power to be produced from that unit is to be disposed of?

A. Yes. This was part of this joint plan that we worked out with Nebraska, 400,000 kilowatts of the 800,000, this is

in round numbers, have been sold on a long term basis to Iowa Power and Light Company.

Q. Is that an investor-owned utility?

A. Yes. I believe it is headquartered in Des Moines.

Q. Is Basin Electric Power Cooperative presently engaged in any studies with Montana-Dakota Utilities concerning construction of transmission?

A. Yes. We are engaged in joint transmission studies with them looking towards a joint transmission contract arrangement under which the cooperatives and MDU would participate in a joint transmission system.

Q. One final question. Looking at page 28 of DX-23, you notice a reference on page 28 to 1200 megawatts of peaking capacity on the Missouri River in Plan 1, Plan 2, Plan 3 and Plan 4? Well, it's mentioned, as I see it here, in each of the seven plans that are described on pages 28 and 29. Now, is that 1200 megawatts of peaking power the peaking power we were talking about earlier that the Corps of Engineers is studying?

A. Yes, it is. Well, at that time nobody knew it [T. IV, 65] might cost as much as $330 a kilowatt. This information was given by the Corps only within the past, I guess, six, eight months.

Mr. Anderson: That's all I have, Your Honor.

Mr. Field: We have no further questions, Your Honor.

The Court: You may step down. Thank you.

(Witness excused.)

Mr. Anderson: That leaves us, Your Honor, with one more witness in our direct case, Mr. Trommershausen, who will be here on Monday.

The Court: Is there anything we can do this afternoon?

Mr. Anderson: Well, we endeavor to, or I should say Mr.

Jaeger and Mr. McNeil endeavor to discuss the last group of proposed Government exhibits, and the upshot of the discussion was that a new list, revised list was prepared and that list, I believe, has been given to Mr. Field earlier this morning. I will give Your Honor a copy of this exhibit list and also we were able to type up completed cross-indexes. You may recall we had a discussion yesterday about that. I must say now in light of some further thought I think Mr. Field is right. I [T. IV, 66] think his approach is a little better but a little less Rube Goldbergish than mine, perhaps, but we have agreed that the approach we suggested might well be used in any event.

[T. IV, 67] I have here the list of exhibits, proposed exhibits and that represents the end of our exhibits with the exception of two maps which Mr. Trommershausen is going to put in, and these are the cross indexes here.

The Court: What should we do now?

Mr. Anderson: Well, if you think it would be an appropriate time to do it, perhaps I should begin to offer the exhibits, the exhibits listed on that list, and we can go through that exercise at this point. That would be the end of our exhibits, and all we have left then will be Mr. Trommershausen on Monday.

The Court: I gather that some of these you object to or want to make—

Mr. Field: Yes, it will take a little time to go through them appropriately.

The Court: Well, it's almost lunch time; dinner time, as we say in the country.

We will recess until 2:00 P.M.

I think I would be aided, Mr. Anderson, if you would make a chart for me or some kind of a display which would reflect

the activities in these various towns. I get a little mixed up about them all. I suppose there are 10 or 12 or 15 of them, and if you would make a chart of some kind for me, showing the town and the pertinent [T. IV, 68] dates and what was attempted and what the result was, how the election came out, and what was attempted to be done, what the municipality wanted, wheeling or what they wanted, buy the power wholesale or buy the distribution system in the community, and what the net result was and what is going on now; did the municipality abandon its efforts, and so that in a nutshell I would have the picture about these various towns. I get a little confused about them, what you claim happened.

Mr. Anderson: In our pre-trial brief we did in kind of a capsule form trace the sequence of events in each of these towns. I think it was about five or six pages for each town. I don't know if I can improve on that terribly, but I will try.

The Court: I was going to make it myself, but I thought as long as you are working here you would make it for me. I think an abbreviated thing like that would be helpful for me.

Mr. Anderson: Yes, Your Honor.

The Court: What would you estimate would be our time consumed this afternoon?

Mr. Field: An hour would do it, probably less.

The Court: All right. We will meet at 2:00 o'clock, gentlemen.

(Whereupon an adjournment was taken until 2:00 o'clock P.M., June 4, 1971.)

[T. IV, 69] (June 4, 1971, 2:00 o'clock P.M.)

(Appearances as heretofore noted.)

Mr. Anderson: Perhaps, Your Honor, I should begin by making a formal offer of the next group of government exhibits, namely, GX-374 through GX-434 inclusive, all of which

documents are listed by exhibit number and described briefly on the list a copy of which I will hand to the reporter.

(GX Exhibits 374 through GX 434 inclusive offered in evidence.)

The Court: They may be received subject to objection. Now, Mr. Field, do you want to make your comments?

Mr. Field: Yes, Your Honor. First I ask permission to make the following generalization. Some of these exhibits in the cross index are involved as a part of the deposition of Hartl, Nye, Seashore, Nygaard and Brewer. The depositions themselves having previously been offered and received subject to certain objections which we made in the record at that time to certain portions of the depositions which we submitted in a memorandum form and which has now been incorporated in the record on pages 104 to 107 of the June 1st volume of our record here at trial. The thought was that Your Honor would give consideration to those [T. IV, 70] objections in due course.

The generalization I would like to make is that any of the offered exhibits now which relate to the substance of the matter which was objected to in the depositions themselves that are related to that, the same objections could be considered made to the exhibits which are involved in those areas of testimony.

Is there an objection to doing it that way?

Mr. Anderson: No.

The Court: Fine with me.

Mr. Field: Then without reference to whether they are deposition exhibits or what their source is, I would like to note in the record what observations or objections we have to the exhibits now offered.

The exhibits 374 through 378 relate to Finley, North Dakota. Except as those exhibits may be objected to by being in the material we objected to in the depositions, we have no additional objections for those exhibits.

Exhibits 379 through 381 relate to Crookston, Minnesota, and each of them relates to a date in the 1940's. 379 being in the 1940's and the other two, 380 and 381, by description are 1945 documents. We object [T. IV, 71] to those three exhibits upon the ground that they are remote in point of time and immaterial and they need support as we see it, witness support, not for authentication but for showing the materiality. The context in 1945 is so different from the problem we have before the court in this case that it seems to us that it be encumbent upon the party offering the exhibits to furnish testimony showing their materiality rather than for us to show the reverse by their being admitted without support.

If they are received, of course, the defense will be obliged to explain generally what the situation was in those years and what the context of these exhibits are, and that's going to apply to quite a few other old situations, that is, old in point of time.

Exhibit 382 relates to Milbank, South Dakota, and that's under date of October 2, 1950, which we also object to on the same grounds, remote in point of time and is immaterial and needs witness support for its materiality. What I said about not objecting for authenticity applies to all of these exhibits. We aren't raising objection upon that ground.

Exhibits 383 through 394 all relate to the Village of Wheaton and are with reference to a situation in the 1950's and prior to 1955 and are also in our judgment, and we object to them on the ground of remoteness [T. IV, 72] in the point of

time, and immaterial, and needing witness support for their materiality to any issue in this case.

The Exhibits 395 through 397 contain three documents relating to a lawsuit involving the Village of Wheaton, the dates being 1950 and 1951. We object to those on the same ground, remoteness and immateriality and also that if those three documents are to be received that the documentation of that litigation should not be just fragmentary but should be completed, and if these three are received we would feel obliged to offer what we think would be additional documents completing the documentation of that litigation so the court, if it wishes to go into that litigation, would be fully advised.

The Exhibit 398 relates to the Village of Henning and is one document, supplemental and amended complaint, that date is December 1, 1939. It goes back in history still farther and we object to that upon the ground it's remote in point of time, immaterial and needs witness support for any materiality.

Exhibit 399 relates to the Village of Minneota and that bears a date of 1949 which we also classify as ancient and remote in point of time and object to it upon similar grounds.

[T. IV, 73] Exhibits 400 through 403 relate to Britton, South Dakota, and all bear dates in the 1940's, which are also in our judgment subject to the same objection of remoteness, immateriality, and needing support to show materiality.

Exhibits 404 through 418 all relate to Walhalla, North Dakota, and bear various ancient dates. The first group is in the 1930's and some in the 1940's, and one in April of 1950. They all relate to situations that are remote in point of time. We object to them individually and collectively upon the ground of materiality and upon the ground they need witness support to show their materiality.

Exhibit 419 relates to Velva, North Dakota, and is in modern time and we have no objection to that exhibit.

Exhibits 420 and 421 also relate to Velva and they have relation to an election that Velva held on April 2, 1967, and they are campaign publicity material in the language we have been classifying that type of document in this case. It is not one of the five towns that we thought we were concentrating our attention on and concerning which we entered into a stipulation listing all of the campaign material for and against, still objecting to its receipt in evidence, but furnishing it concerning both sides, both sides, in case the Court wished to receive [T. IV, 74] it in evidence subject to our objection, but Velva is not one of those towns and that is opening up, if that is what it is, campaign publicity material in another town, namely, Velva. We, of course, object to the campaign publicity material upon the same grounds that we did with this type of testimony wherever it has appeared as being improperly applicable to an antitrust case under the decisions we have referred to. Our objection was that the documents would be received in evidence subject to objection, or whatever the arrangement was in the other cases. Now, if these two campaign publicity items are to be received in addition to those other five towns that we concentrated on, then we think the campaign material on both sides of the issue in that town should be full and complete and not just select these two items.

I don't know how to handle that, except that my helpers have given me what they say is the rest of the campaign material in Velva, and if it is appropriate, and without waiving our objection to this type of evidence, I suggest that this be marked, these be marked as exhibits and handled in the same fashion as the two the plaintiff has offered.

I don't know if I make myself clear or not. If they are received, we think the full complement of publicity should be covered and it is understood it is [T. IV, 75] all subject to our objections.

I don't know if the Court wants to open the door for more publicity or not. If the Court does or wishes to reserve its ruling on that, I have in my hand what I think is the balance of that campaign material, and—

The Court: Maybe you want to state your objections to all of them first.

Mr. Field: My objection to the—

The Court: I mean the other exhibits.

Mr. Field: Should I then have these marked?

The Court: I don't suggest you do, but do what you will.

Mr. Field: Perhaps I had better wait for Your Honor's ruling.

Exhibits 422, 423, 424, are contracts or other documents relating to Velva and they are current in point of time, relatively so, anyway, and we have no objection to those exhibits.

Exhibit 425 is a document published by the Federal Power Commission. It needs some explanation for its application to this case, but we can provide that in our part of our case, so that doesn't disturb us particularly.

I talked with Mr. Anderson, that we [T. IV, 76] would wish to offer an item which is a publication by the United States Department of Agriculture, Rural Electrification Administration, 1969 Annual Statistical Report, which I suggest, if we have no objection to their publication, that they wouldn't object to ours. If I stated that properly, I believe that is the situation.

On that assumption, we have no objection to Exhibit 425, and at the conclusion of the process I would ask permission

to mark the other exhibit and offer it when we are through with this feature.

Exhibit 426 is the Otter Tail Power Company annual report for 1970. We have no objection to that.

Exhibit 427 is a document relating to Wheaton, which has a time date of 1941, although it isn't shown on the description here. We object to that on the grounds of being remote in point of time, immaterial to the issues in the case and needs evidentiary support to show its materiality.

Exhibit 428 relates to Finley and has a 1964 date. We have no objection to that.

Exhibit 429 is another Wheaton document which has dates in the 1940's and early 1950's and we object to it upon the grounds that we did to Exhibit 427.

Exhibit 430 is a copy of a speech given [T. IV, 77] by Mr. Shields, I believe, of the Junior Chamber of Commerce to the citizens of Wheaton in 1954, and we object to that upon the grounds it's immaterial, remote in point of time and of no help to the Court in deciding the case.

Exhibit 431, I think, Your Honor, the contents of that is otherwise in the record, as I recall, and we have no objection to it.

Exhibit 432 is a current agreement between the cooperative and the City of Barnesville and if it is helpful in this case, we have no objection to its receipt in evidence.

Exhibit 433, it doesn't occur to me what town that relates to, but it has a current date and we have no objection to it.

Exhibit 434 relates to Elbow Lake and has a current date, and we have no objection to that.

Now I hope I have gone through the list.

The Court: Why is it that you want all of this material in here from pre-1955? How will that help us?

Mr. Anderson: Well, as I explained the other day, we think it is important that the Court know that (a), Municipal agitation had been occurring sporadically over a fair period of time and that it developed in the pre-Bureau period when there was no so-called Government [T. IV, 78] power around and in those days there were Diesel plants. Throughout all these stages, we think it shows Otter Tail has reacted in generally the same sort of way whenever there has been municipal agitation, we see a pattern throughout, and we think that in a Section 2 monopolization case it is very important in studying the behavior of a firm who is allegedly a monopolist, to study its behavior over a time span.

[T. IV, 79] Most of these towns, most of these situations have been discussed in a little detail in our deposition, particularly the deposition of Mr. Hartl during the course of which he sketched in the details and to the extent explanations were needed as to the problem in that particular time frame, he provided to a considerable extent in order to understand, to get the background of what's being discussed in the deposition, that were not to have these documents to make more meaningful the deposition.

We do feel that in a case of this sort it is very appropriate to have before the Court at least some background information concerning the past conduct of the firm which we are dealing with.

As I think the brief that we submitted the other day indicated, it's not at all unusual, as a matter of fact it's a customary thing in a Section 2 case to have evidence of this sort, and we have made a stringent effort to limit the extent to which we have put evidence of this type before the Court. We feel that this rather limited amount will suffice and make the point.

The Court: Well, there is Crookston and Wheaton and Walhalla, it's really all ancient, just about a generation ago, you know, isn't it?

Mr. Anderson: Well, it is fairly old, but it's important to recognize that even before [T. IV, 80] the Bureau—now, in this case, as I understand it, Otter Tail's position is that because the Bureau exists and has had power, it has had to embark on a vigorous effort to combat this municipal agitation in order to make sure that all of its system doesn't erode because people will run to the Bureau. It's important to know that even before the Bureau was around Otter Tail was proceeding exactly the same way. There has been a historical pattern of very similar type conduct. In those days the problem was the Fairbanks-Morse Company and its diesel generators. That became somewhat passe.

We then move into the Bureau period, Otter Tail proceeds in the same general pattern, and in general the same results obtained. Most of the cities gave up the effort, and so I think that it's important to be able to trace the pattern of conduct over this period of time.

We really don't go back that far, and I think there are a couple instances where we go back to the 30's, but everything else, as I recall, is mid 40's forward, and we submit that that's not really going back very far. We are not going back to the turn of the century or even back to the 20's. We think this is an appropriate time span.

The Court: Have I heard you out?

Mr. Anderson: Yes.

[T. IV, 81] The Court: I am not adverse to admitting it because the Court of Appeals has told us in court bench trials to let in everything and then only consider the material which you think is pertinent, but the disadvantage of letting

this in is that it places the burden on Otter Tail to come in and explain it, if they have an explanation, to make some statements and present some evidence. It seems that detracts us from where we are really going here. It unduly prolongs the things. That is my thinking on it.

Mr. Anderson: That's why I called attention to the fact that, as I recall, I think every one of these situations have been explored in our depositions.

The Court: Of course, that doesn't make it the gospel.

Mr. Anderson: It doesn't make it gospel, but the point is that we did proceed in those depositions in such a way that in my judgment, at least, the Otter Tail people had a fairly ample opportunity to put those situations in whatever perspective they thought they should be put into.

The Court: Well, that was a deposition. We are in a stage 2 here now. Have I heard you out?

[T. IV, 82] Mr. Anderson: Yes.

The Court: All these exhibits which have been tendered are received, GX-374 through 434 except the material dealing with Crookston, 379 through 381; the material dealing with Milbank, 382, all the material dealing with Wheaton 383 through 397; the material dealing with Henning and Minnesota, 398 and 399; the material dealing with Britton, 400 through 403; the material dealing with Walhalla, 404 through 418; the material dealing apparently again with Wheaton or some town which Mr. Field represents has a 1942 date on it, to-wit, GX-427; more material dealing with Wheaton, GX-429 and 430.

I guess I would have been quicker to state what I was letting in I guess.

(GX-Exhibits 374 through 378, 419 through 426, 428, 431 through 434 received in evidence.)

The Court: I have no objection to that political stuff coming in and at the appropriate time you can put the other story of the campaign in.

Mr. Field: I ask permission to have them marked right now.

The Court: As you will.

You understand that you are not going to call Mr. Hartl, you are just going to submit his [T. IV, 83] deposition?

Mr. Anderson: Well, that was one thing—we are going to submit his deposition.

The Court: That's pretty big, several days wasn't it?

Mr. Anderson: Yes.

The Court: Several volumes?

Mr. Anderson: Three days, one volume.

The Court: Is everything you went into in the deposition pertinent to the trial here at this stage?

Mr. Anderson: We think so.

The Court: I mean if he went into Walhalla as you all did, you went into that ancient history I am not sure that—

Mr. Anderson: I think to that extent that we went into that then obviously we are not going to be able to use it.

The Court: You are going to have Al Hartl testify, I suppose?

Mr. Field: Yes. The deposition Mr. Anderson speaks of was discovery oriented plaintiff's deposition type of thing and our direct evidence is going to go in before Your Honor on our side of the case.

[T. IV, 84] Mr. Anderson: Certainly our use of that deposition, Your Honor, we can be guided by your ruling here today and to the extent that the deposition refers to matters you have now ruled out, I guess we won't make any use of it.

The Court: Did you want to get those marked, Cy?

Mr. Field: If I may. I would like to mark this publication too if I may.

Perhaps I should wait until our side of the case. Would it matter?

[T. IV, 85] The Court: It doesn't to me, but for orderliness I would think you might want to.

Mr. Field: Well, we understand each other, I guess.

The Court: I gather Mr. Anderson doesn't have any objection to your putting in your stuff.

Mr. Anderson: I have no objection, no.

Mr. Field: Then I present for identification at least what we think is the balance of the publicity campaign material in Velva in order to complete the record of that type of material with reference to the Velva election with the understanding that we are not doing this waiving our objection to this type of material but just to complete the campaign and publicity material in Velva now that a part of it has been received subject to our objection.

(Defendant's Exhibits 25 through 37 marked for identification.)

(Discussion off the record.)

Mr. Field: I will offer these exhibits, Your Honor.

(Defendant's Exhibits 25 through 37 offered in evidence.)

The Court: Absent objection, they may be received.

Mr. Anderson: No objection.

[T. IV, 86] The Court: They may be received.

(Defendant's Exhibits 25 through 37 received in evidence.)

Mr. Anderson: Would it be appropriate for me to inquire as to whether the defendant will present any of the other witnesses, he had a list I think of ten and I think indications are that at least three of those ten will be here testifying. So we

can keep prepared and keep things moving fairly well, it would be of help to know if all ten will appear or not?

Mr. Field: Yes. I would be glad to respond to that. Several of the witnesses we had listed were preparation on our part to meet the local witnesses that you had listed and which we have now processed the materiality of and so forth and as things stand now we do not plan to call the witnesses from Elbow Lake, Hankinson—

The Court: You are just going to have your three, just those three main ones?

Mr. Field: We haven't made a decision yet on Mr. Zook. He is the manager of Cooperative Power Association, one of the contracting parties involved in one of the contracts. We may not call him either, but we haven't arrived at that decision yet.

The Court: You will have the three main ones, Hartl, Nye and your expert and maybe Zook?

[T. IV, 87] Mr. Field: Yes. That's it.

The Court: What about your expert in rebuttal, what's the latest about him?

Mr. Anderson: We talked to him last night and should things proceed at a good pace next week and should we be almost finished by Friday, he will be available on Saturday. Now, I don't know how enthusiastic you are—

The Court: No. I won't be available on Saturday.

Mr. Anderson: You won't be available on Saturday. Then probably we may have to forget about him unless we can do it by deposition. What would your thoughts be, Your Honor, if it is necessary to use him at all on our deposing him in lieu of his testifying?

(No response.)